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IN THE

Supreme Court of the United States

October Term, 1967

No. 1092

REED ENTERPRISES, *et al.*,

Appellants,

vs.

RAMSEY CLARK, *et al.*,

Appellees.

MILTON LUROS, *et al.*,

Appellants,

vs.

RAMSEY CLARK, *et al.*,

Appellees.

SANFORD ELESTEL ADAY, *et al.*,

Appellants,

vs.

RAMSEY CLARK, *et al.*,

Appellees.

On Appeal From the United States District Court for the District of Columbia.

JURISDICTIONAL STATEMENT.

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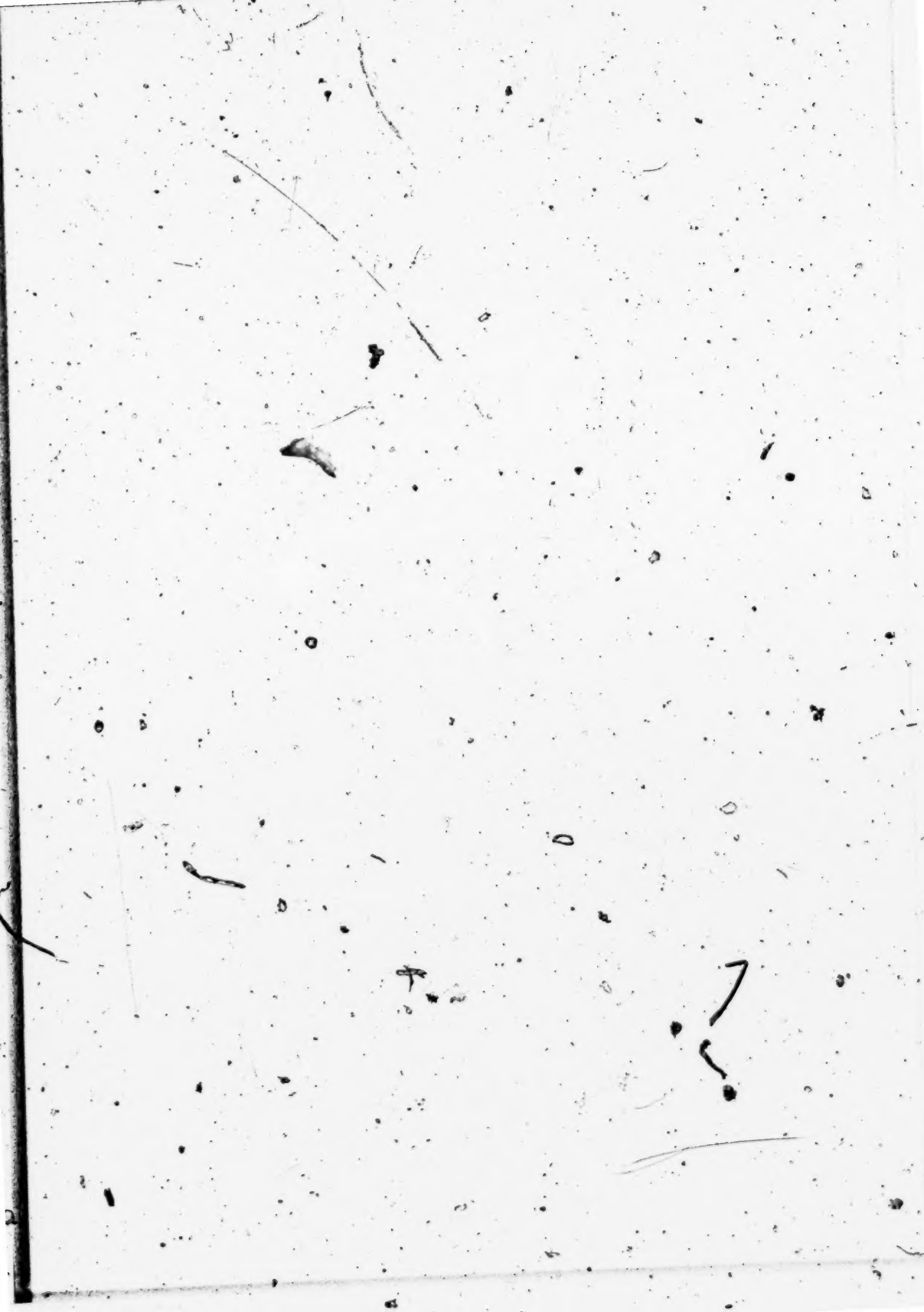

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On Appeal From the United States District Court for the District of Columbia.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment and order of the United States District Court for the District of Columbia entered on October 26, 1967, granting the motion of appellees for summary judgment in each of these consolidated actions, denying appellees' motion to dismiss, and denying appellants' motion for summary

judgment. Appellants submit this Statement to show that this Court has jurisdiction of this appeal and that substantial questions are presented.

Opinions Below.

The opinion of the District Court for the District of Columbia is unreported. A copy of the opinion is attached hereto as Appendix A. The opinion of the Court of Appeals for the District of Columbia in the related case of *Reed Enterprises, et al. v. Corcoran* is reported in 354 F. 2d 519 (D.C. Cir. 1965). A copy of the opinion is attached hereto as Appendix B.

Jurisdiction.

These actions were brought under 28 U.S.C. §§1331-1332, 2201-2202, 2282 and 2284, praying for declaratory and injunctive relief, upon the grounds that 18 U.S.C. §§1461 and 1462, as amended in 1958 [Pub. L.85-796, §§1-2, 72 Stat. 962] violate appellants' constitutional rights as guaranteed under the First, Fifth and Sixth Amendments and Article I, §8 of the Constitution. The judgment and order of the District Court (Appendix A) was entered on October 26, 1967, and notice of appeal was filed in that Court on December 12, 1967. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Aptheker v. Secretary to State,* 378 U.S. 500; *Schneider v. Rusk,* 377 U.S. 163; *Dombrowski v. Pfister,* 380 U.S. 479; *Keyishian v. Bd. of Regents,* 385 U.S. 589; *Zwicker v. Koota,* 88 S. Ct. 391.

Question Presented.

Whether the provisions of 18 U.S.C. §§1461 and 1462, as amended in 1958 [Pub.L.85-796, §§1-2, 72 Stat. 962], authorizing unrestrained and unlimited forum-picking by federal prosecutors and multi-venue prosecutions, create vague, ambiguous, overbroad and unascertainable standards; act as a prior restraint upon the circulation of the press; deprive the public of access to constitutionally protected material; abridge freedoms of speech and press; deprive persons of their liberty and property without due process of law and their right to a fair trial and the venue protection of the constitution, and constitute an unlawful delegation of Congressional power, all in violation of the provisions of the First, Fifth and Sixth Amendments, and Article I, §§1 and 8, and Article III, §2 of the Constitution.

Constitutional Provisions, Statutes and Rules Involved.

The pertinent provisions of the First, Fifth and Sixth Amendments and Article I, §§1 and 8, and Article III, §2, of the Constitution; the provisions of the 1958 Amendments to 18 U.S.C. §§1461 and 1462 [Pub.L. 85-796, §§1-2, 72 Stat. 962]; the entire provisions of 18 U.S.C. §§1461 and 1462 as presently effective; the provisions of 18 U.S.C. §3237(a) [Act of June 25, 1948, Chap. 645, 62 Stat. 826; Pub.L. 85-595, 72 Stat. 512]; and Rules 18 and 21(b) of the Federal Rules of Criminal Procedure, are attached hereto as Appendix C.

Statement of the Case.

(a) The complaints herein, filed respectively on July 19, October 14 and December 2, 1965, were similar in character. Each alleged, among other things, that appellants were engaged in the business of publishing and distributing throughout the Nation books, magazines and other writings which are protected from governmental infringement by the provisions of the Constitution. The pleadings further alleged that 18 U.S.C. §§1461 and 1462, as amended, violated appellants' constitutional rights as guaranteed under the Constitution, in that the statutes abridge the exercise of freedoms of speech and press contrary to the provisions of the First Amendment; impose a prior restraint upon the lawful circulation of books and other writings; restrict the public's access to reading material; create a universal censorship; arbitrarily and capriciously deprive persons, including appellants of their liberty and property without due process of law in violation of the Fifth Amendment; purport to authorize arbitrary forum-picking by federal prosecutors and the institution of multiple prosecutions for identical material in districts far removed from the residences and places of business of alleged violators in violation of the free speech and press, due process and fair trial provisions guaranteed by the First, Fifth and Sixth Amendments; and that the statutes, by reason of their vagueness, lack of ascertainable standards and unconfined breadth and scope, abridge the free speech and press and due process provisions of the First and Fifth Amendments.

It was further alleged that the Appellees[1] threatened to enforce 18 U.S.C. §§1461 and 1462, as amended, against the appellants unless restrained by the Court, and that such actions by appellees would necessarily involve appellants in a multiplicity of legal proceedings, result in a destruction of their good-will and property, exhaust their financial and physical resources so as to make it impossible to adequately defend against such multiple criminal prosecutions, and that such conduct would seriously diminish the circulation of Appellants' books and other writings and cause them to suffer substantial and irreparable loss and damage for which Appellants had no adequate remedy at law.

It was alleged that the intent of the Appellees was to employ threats of prosecution, and prosecution, under color of the federal obscenity statutes, in order to harass Appellants and exhaust their financial and physical resources to such an extent as to put Appellants out of business; to thus interfere with the rights of Appellants to publish and distribute constitutionally protected writings, to deny to the public access to Appellants' material, to establish a national censorship of all books and writings dealing with sex, to impose a prior restraint upon the circulation of the press, and to arbitrarily deprive Appellants of their liberty and property without due process of law and to deprive Appellants of their right to distribute constitutionally protected books and other writings in interstate commerce.

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[1]Each of the actions was initially instituted against Nicholas de B. Katzenbach, individually and as the then Attorney General of the United States; and certain named Assistants who were responsible generally in the Department of Justice for the enforcement of the federal criminal laws, and specifically in the area of criminal prosecutions involving violations of 18 U.S.C. §§1461 and 1462, as amended.

Each Appellant prayed for a declaration that 18 U.S.C. §§1461 and 1462, as amended, violate the provisions of the First, Fifth and Sixth Amendments and Article I, §8, of the Constitution; for an injunction restraining the Appellees from any threatened prosecutions, or prosecutions, under the statutes, as amended, and for the convocation of a three-judge court pursuant to the provisions of 28 U.S.C. §§2282 and 2284.

In *Reed Enterprises, et al.* and in *Luros, et al.*, the applications for the convening of a three-judge court were denied by single District Judges sitting in the District Court of Columbia. Thereafter, mandamus proceedings were instituted in the Court of Appeals for the District of Columbia Circuit. In an opinion rendered by the Court of Appeals on December 2, 1965, it was held that "the complaints filed in District Court raise a substantial question as to the constitutionality of the 1958 amendment". (*Reed Enterprises, et al. v. Corcoran* [*Luros, et al. v. Sirica*], 354 F. 2d 519, 522; Appendix B., p. 29), and that a three-judge court was therefore required.

Following the aforesaid proceedings, a three-judge court was constituted, consisting of the Honorable Edward A. Tamm, United States Circuit Judge; John J. Sirica, United States District Judge; and Howard F. Corcoran, United States District Judge, and the three proceedings were consolidated for hearing before the said three-judge court.[2]

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[2]Mandamus proceedings were instituted by *Reed Enterprises, et al.* and *Luros, et al.* prior to the filing of the complaint in *Aday, et al.* The opinion of the Court of Appeals in *Reed* and *Luros* directing the convocation of a three-judge court made it unnecessary to institute any mandamus proceedings for *Aday, et al.*

(b) In *Reed Enterprises, et al.*, at the time of the filing of the complaint and the application for a three-judge court, there was also filed a motion for preliminary injunction. In opposition to the motion, appellees urged that the Court lacked jurisdiction over the subject matter of the complaint and that there were no circumstances justifying preliminary injunctive relief. The affidavit of Fred. M. Vinson, Jr., an Assistant Attorney General in charge of the Criminal Division of the Department of Justice, and a defendant in the action, alleged that the Department of Justice had "not taken any action with respect to plaintiffs which is intended to harass the plaintiffs or to abridge any freedoms to which they are entitled", and that any grand jury investigation or prosecution of Appellants would be conducted in the good-faith belief that there had been a violation of the law "as interpreted by the Supreme Court of the United States". Another affidavit in opposition was submitted by Edward J. Pesce, an attorney in the General Crime Section of the Criminal Division, Department of Justice, and also a defendant in the action. The Pesce affidavit stated, among other things, that the only federal proceedings involving these plaintiffs were "those before a Federal grand jury in Houston, Texas".

Because of the failure of the District Court to convene a three-judge court as requested by plaintiffs and the institution of mandamus proceedings in the Court of Appeals, no ruling was made on the application for preliminary injunction. On September 10, 1965, the petition for mandamus was filed in the Court of Appeals and, on the same day, these Appellants were indicted in the Southern District of Texas, Houston Division, some 1,500 miles away from their businesses and

places of residences in California, and charged in a 26-count Indictment with violations of 18 U.S.C. §1462, as amended.

Following the direction by the Court of Appeals for the convocation of the three-judge court, Appellees made answer in the District Court, generally denying the allegations of the complaint and alleging as defenses that the Court lacked jurisdiction over the subject matter of the complaint, that the complaint failed to state a claim upon which relief might be granted, and admitting only that Appellants had been indicted in the Southern District of Texas, and alleging that the books and writings named in the Indictment were obscene and not entitled to constitutional protection. Thereafter, the three-judge court requested counsel to see whether or not the case could be heard on stipulated facts and, in the light of the pendency of *Ginzburg v. United States* before the Supreme Court, postponed hearing on the motion for preliminary injunction which had theretofore been made.

The date for trial of the criminal prosecution in Houston having been set for July 5, 1966, a motion for a stay of the said trial was made by Appellants on June 13, 1966 and denied by the three-judge court on June 21, 1966. The three-judge court held that the burden of defending the criminal prosecution pending in Houston did not "constitute such great and immediate danger of irreparable injury as to warrant the relief requested". A similar motion for a stay was presented to Mr. Justice Black who denied the motion on June 29, 1966 with the following endorsement:

> "As shown by the Court of Appeals opinion in Reed Enterprises v. Corcoran, 354 Fed. 2nd 519,

this proceeding involves serious constitutional questions concerning multiple prosecutions in many jurisdictions. I am denying the stay here however, solely because of the Solicitor General's statement that no other prosecutions are intended to be brought anywhere based on the materials here involved—Petition denied."

Thereafter, counsel for the respective parties, and in accordance with the request of the three-judge court, entered into a stipulation of facts with respect to the three consolidated causes pending before the Court. Attached hereto as Appendix D is a copy of the said Stipulation. With respect to *Reed Enterprises, et al.*, it was stipulated (Appendix D, pp. 45-47) that the principal place of business was in San Diego, California; that the 26-count Indictment returned in Houston, Texas involved seven books entitled respectively, *Orgy Club, Sin Summer, Shame Hunger, Temple of Shame, Virgins, Inc., Passion Carousel* and *Swap Sect;* that the books had been transported into the Southern District of Texas in the regular course of Appellants' business operations and purchased from local retail outlets by agents of the Federal Bureau of Investigation; that on September 2, 1966, following an 8-week trial before a jury, in which all of the individuals accused and their five attorneys were present throughout, the jury reported itself deadlocked and was dismissed; that motions for judgments of acquittal were denied and the case scheduled for retrial commencing on May 15, 1967[3];

[3]On April 26, 1967, the Honorable Joe Ingraham, a United States District Judge for the United States District Court, Southern District of Texas, Houston Division, and the trial judge who presided at the trial in Houston which resulted in the deadlocked

(This footnote is continued on the next page)

and that there had been no other federal criminal proceedings against the Appellants relating to any of the publications aforementioned.

(c) In *Luros, et al.*, there was a similar motion for preliminary injunction in conjunction with the filing of the complaint and the application for the convening of a three-judge court. At the time of the filing of the aforesaid papers, the Appellants had already been indicted on March 24, 1965 in the Northern District of Iowa, Western Division, under a 25-count Indictment charging Appellants with violations of 18 U.S.C. §§1461 and 1462, as amended, and conspiracy to violate said statute. The Appellants were being required to face a trial over 1,500 miles from Los Angeles, California, their place of businesses and residences.

As in *Reed Enterprises* aforesaid, similar opposition to the motion for preliminary injunction was submitted by the Appellees and, again, no ruling was made on the application for the preliminary injunction pending the mandamus proceedings in the Court of Appeals. Again following the direction of the Court of Appeals for the convocation of the three-judge court. Appellees made answer and in similar fashion hearing on motion for preliminary injunction was postponed pending the formulation of stipulated facts as requested by the three-judge court. There were also applications for stays of the trial in Sioux City, Iowa, all of which were denied. Thereafter, counsel for the respective parties entered into the same stipulation of facts (Appendix D).

With respect to the *Luros, et al.* proceedings, it was stipulated (Appendix D, pp. 47-53) among counsel

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jury, granted a motion for transfer of the proceedings to the United States District Court for the Southern District of California. *United States v. Hamling, et al.*, Criminal No. 65-H-172.

for the respective parties that on March 24, 1965, in Ft. Dodge, Iowa, these Appellants were indicted on 25 counts for allegedly shipping interstate and mailing quantities of six different paperback books and 25 different magazines into the Northern District of Iowa in violation of the federal obscenity statutes. The books involved in the Indictment were entitled: *Lesbian Sin Song, Two Women in Love, Pleasure House, Lesbian Alley, The Three Way Apartment* and *The Affairs of Gloria*. The magazines involved were various issues of so-called nudist and "girlie" magazines.

It was further stipulated between the parties that only two copies of each of five of the books named in the Indictment and three copies of the other book were ever mailed into the Northern District of Iowa, and this was done by "test orders" sent from the Northern District of Iowa at the behest of various Postmasters in Iowa, St. Louis and Los Angeles. This same decoy method was used to obtain a number of the magazines named in the Indictment.

It was stipulated that the trial in the Northern District of Iowa began on October 18, 1965; that prior to the submission of the case to the jury, District Judge William C. Hanson dismissed the conspiracy count and six other counts of the Indictment involving "girlie" magazines. In all, 18 of the original 25 counts were submitted to the jury. With the exception of two of the counts of the Indictment, all of the remaining 16 counts in the Indictment were based on books and magazines which had been surreptitiously ordered by a Postal Inspector in California through intermediaries in Iowa, as the stipulation reveals.

The jury found all parties guilty on each of the 18 remaining counts of the Indictment. Motions for judgments of acquittal were later granted as to all individual Appellants, except Appellant Milton Luros, and the corporate Appellants. On January 6, 1967, the individual Appellant was sentenced to five years imprisonment and fined $25,000. Two of the corporate Appellants were each fined $25,000 and two other corporate Appellants were each fined $12,000. A notice of appeal was then filed.[4]

Finally, it was stipulated that there have been no other federal proceedings against Appellants at any time relating to the publications named in the Indictment.

(d) In *Aday, et al.,* the proceedings on the motion for preliminary injunction were similarly left in abeyance; the Appellees made answer, and following consolidation of the three actions and the convocation of the three-judge court, the stipulation between the parties (Appendix D) was entered into and included facts relative to these Appellants (Appendix D, pp. 42-45).

It was stipulated that the Appellants resided and had their principal place of business in Fresno, California. It was further stipulated that on April 2, 1958, the Appellant Aday was indicted in the United States District Court for the Southern District of California for three alleged violations of 18 U.S.C. §1461. While 11 pocketbooks were involved in the prosecution, only 3

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[4]The trial under the Ft. Dodge Indictment was held in Sioux City, Iowa. The appeal to the Court of Appeals for the Eighth Circuit has been argued and is awaiting determination. *Luros, et al. v. United States,* Nos. 18707 through 18711, inclusive. For various rulings made during the Sioux City trial, see *Luros v. Hanson,* 382 U.S. 956; *United States v. Luros,* 243 F. Supp. 160 (1965), 260 F. Supp. 697 (1966).

were submitted to the jury, the Government withdrawing 8 of the titles prior to submission. The jury returned a not guilty verdict with respect to a book entitled *Rambling Maids,* and deadlocked on the other 2 books entitled *Strange Three* and *Turbulent Daughters.* The entire Indictment against Appellant Aday was subsequently dismissed.

The Appellants were indicted for violations of 18 U.S.C. §1462 [as amended in 1958] in Grand Rapids, Michigan on May 24, 1960; in Phoenix, Arizona on April 26, 1960; and in Honolulu, Hawaii on October 12, 1960. In Grand Rapids, Michigan, the 18-count Indictment involved 8 books entitled respectively, *Sex Life of a Cop, Decisive Years, Witch Finder, Love Princess, Never Enough, I am a Lesbian, Desperate Moments* and *The Black Night,* the last title of which had been the subject of the aforesaid Fresno trial in 1958 and one of the books which had been withdrawn prior to submission of the case to the jury. In Phoenix, Arizona, the book involved was *Sex Life of a Cop.* And in Honolulu, the books involved were *Sex Life of a Cop, Decisive Years* and *Each Won Two.*

In Grand Rapids, Michigan, the jury disagreed as to all counts of the Indictment except the five counts involving the book *Sex Life of a Cop.* Appellants were convicted on December 12, 1963 and sentenced on December 30, 1963. Following the convictions in Grand Rapids, the proceedings in Honolulu and Phoenix were dismissed by the Government. The corporate Appellant was fined $25,000; the Appellant Aday was fined a total sum of $25,000 and sentenced to a total prison term of 25 years. The remaining individual Appellant was fined a total of $19,000 and sentenced to a total prison

term of 15 years. On March 22, 1966, the judgments of conviction were sustained by the Court of Appeals for the Sixth Circuit, but remanded for reconsideration of the sentences. *United States v. West Coast News Co., et al.*, 357 F. 2d 855. On April 6, 1966, the District Court resentenced Aday to 10 years imprisonment and the other individual Appellant to 5 years imprisonment, leaving in effect the fines which had been initially imposed. A petition for a writ of certiorari to the United States Supreme Court was filed.[5]

On March 26, 1965, the Appellants were indicted on 10 counts in Houston, Texas, again charged with violations of the federal obscenity statutes. The five titles involving in the Indictment are entitled: *The Awakening of Cindy, The Girls of Club Sappho, The Women Were Willing, The Swingers* and *Twisted Passions.* All of the alleged transportations occurred after the return of the Indictment in Grand Rapids, Michigan, and 6 of the said alleged transportations occurred after the Grand Rapids conviction. There have been no other federal criminal proceedings against Appellants relative to the aforementioned publications.

The books named in the Honolulu, Grand Rapids and Houston Indictments were transported into the Districts in the regular course of Appellants' business. In each case, the books were then purchased from local retail outlets by agents of the Federal Bureau of Investigation.

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[5]On June 12 1967, the Supreme Court granted the petition for a writ of certiorari and reversed the judgment of the Court of Appeals, based on *Redrup v. New York,* 386 U.S. 767 (388 U.S. 447). For related decisions, see *Aday v. United States District Court for Western District of Michigan,* 318 F. 2d 588 (6 Cir. 1963), Cert. denied 385 U.S. 39; *United States v. West Coast News Co., et al.,* 30 F.R.D. 13 (1962), 216 F. Supp. 911 (1963), and 228 F. Supp. 171 (1964).

(e) Appellants moved for summary judgment based upon the pleadings and the stipulation of facts (Appendix D). Appellees moved to dismiss each of the actions upon the grounds that the Court lacked jurisdiction and that Appellants stated no basis for equitable relief. In the alternative, Appellees moved for summary judgment against Appellants in each of the actions based upon the stipulation of facts (Appendix D) and the affidavit of Fred M. Vinson, an Assistant Attorney General, setting forth what purported to be the policy of the Department since the enactment of the 1958 Amendments to 18 U.S.C. §§1461 and 1462.

(f) On October 26, 1967, the three-judge court rendered its opinion and judgment, denying the motion to dismiss, denying appellants' motion for summary judgment and granting the motion of Appellees for summary judgment, in the consolidated causes (Appendix A). The District Court held that the federal obscenity statutes are founded on the powers of Congress to exclude "objectionable and non-constitutionally protected material" (Appendix A, pp. 6-7) from the mails; that where a crime involves some aspect of interstate or foreign commerce, Congress is constitutionally empowered to determine where venue will lie for purposes of federal jurisdiction; that Congress could constitutionally designate as a continuing offense the use of the mails for transporting obscene material and that such designation did not violate the Sixth Amendment venue provisions of the Constitution. The District Court further held that neither the due process nor free speech and press provisions of the Constitution were violated by the 1958 Amendments to the federal obscenity statutes. The Court stated that every criminal prosecution

in an obscenity case may have some deterrence upon the exercise of freedoms of speech and press, and that "any increase in apprehension which may accrue on a purely subjective basis by reason of the injection of a multiple-venue provision is at most ancillary and *de minimis*". (App. A, p. 21).

The notice of appeal to this Court was filed on December 12, 1967.

The Questions Are Substantial.

1. 18 U.S.C. §§1461 and 1462 were amended on August 28, 1958 to provide generally that whoever knowingly uses the mails for the mailing, or knowingly uses any express company or any other common carrier for carriage in interstate commerce, anything declared by the law to be nonmailable is subject to fine and imprisonment [Pub.L. 85-796, §§1-2, 72 Stat. 962]. Prior to the enactment of the said Amendments, the offense under the federal obscenity statutes was held to be complete when the deposit for mailing or delivery was made. The courts uniformly held that the offense under the federal obscenity statutes did not involve the use of the mails, as that phrase is used in 18 U.S.C. §3237. The courts held that the latter statute must be read in the light of the Sixth Amendment to the United States Constitution, and that there was a clear distinction between a deposit for mailing or delivery and the use of the mails. *United States v. Ross,* 205 F. 2d 619 (10 Cir. 1953).[6]

The Bill to amend the federal obscenity statutes was introduced into the House in 1957. [H. R. 6239]. Be-

[6]No venue question was presented in *Roth-Alberts,* 354 U.S. 476, decided prior to the 1958 Amendments. See, *Ginzburg v. United States,* 383 U.S. 463, 464, n.1.

fore a House Judiciary Committee which had the Bill under consideration, witnesses appeared to urge the defeat of the proposed measure because, it was argued, enactment of the Bill "would create new risks for reputable publishers and booksellers; [it] would subject them to community standards which might be quite different from their own, to the disparate standards of every American community into which their books might be sent. . . . A pliant or zealous prosecutor might be persuaded to press for an indictment . . . Publishers could be forced to transport lawyers, witnesses, and other ammunition for defense to a distant, hostile place. . . ." Paul and Schwartz, *Federal Censorship: Obscenity in the Mail* 185-186 (1961).

On May 17, 1957, the General Counsel for the Post Office Department wrote to the Chairman of the Judiciary Committee of the House, urging enactment of the Bill in order to "settle the jurisdictional question so that violators . . . can be prosecuted at the place of mailing, at the place of address or delivery, or in any judicial district through which the objectionable matter is carried in the mails". The General Counsel added: "The circulation of obscene matter in any community tends to debase its morals. Therefore, its citizens should be free to prosecute the persons responsible for such obscenity." 1958 U.S. Code, Cong. and Ad. News 4014-4015. Sec. 104 Cong. Rec. 8991-8996, 15610-15611 (1958).

When the Bill was sent to the Senate, the Attorney General wrote to the Vice President on March 14, 1957, advising him that the Department of Justice supported the proposed measure and stated: "This measure is intended to overcome the effect of the Ross de-

cision, making it possible to prosecute violators of section 1461 at the place of which the objectionable matter is mailed, at the place of address or delivery, or in any judicial district through which such mail matter is carried. Thus, the amendment will materially increase the effectiveness of the statute." 1958 U.S. Code, Cong. and Ad. News 4015-4016.

The Senate however, while giving general approval to the Bill, suggested a substitute measure. S. Rep. No. 1839, July 15, 1958 [to accompany H.R. 6239]. The Senate proposed that the Bill be amended to make it possible to prosecute violators only at the place where the matter was mailed, or at the place of address or delivery. "In this respect it takes a middle ground between the *Ross* case cited above (which would allow prosecution only at the place of deposit) and section 3237 of title 18, United States Code (which would allow prosecution in any district from, through, or into which the mail matter moves)." It was stated that the adoption of this middle view was based upon the ground "that unrestricted 'forum shopping' can lead to abuses and is, therefore, against public policy". 1958 U.S. Code, Cong. and Ad. News 4013.

Thereafter, the House disagreeing with the Senate Amendments to the proposed Bill, the measure was sent to conference. The Conference Report stated that it was "the position of the Post Office Department that the crime of sending obscene matter through the mails is a *continuing crime* from the point of deposit, in transit, and at the point of delivery. The House concurred in the position of the Post Office Department. . . ." The Conference Report added: "Question has been raised as to whether the Post Office Department in-

tends to press for the prosecution of violations of the law in the jurisdictions through which the unlawful mailed matter passes in transit, if the language of the House of Representatives is restored to the Bill by the conferees. In a letter dated August 5, 1958 . . . the Post Office Department answers this question 'emphatically' in the negative." 1958 U.S. Code, Cong. and Ad. News 4017.

The House version was finally reported out and passed. The measure was approved on August 28, 1958.[7]

2. The legislative history indicates a clear Congressional intent to authorize multi-venue prosecutions under the federal obscenity statutes based upon the local community standards of each and every community in which books or writings are mailed, at their place of address or delivery, or in any district through which the material is carried or transported. This view has been expressed by a number of judges in the Federal Courts before whom the question has been raised. Thus, in *United States v. Frew,* 187 F. Supp. 500 (D.C. Mich. 1960), Circuit Judge O'Sullivan (sitting by designation) denied collateral estoppel effect to earlier District Court proceedings in Los Angeles in which allegedly the same materials as those forming the basis of the

[7]Upon the enactment of the Bill, "the Judiciary Committee openly warned that United States prosecutors were not to abuse their new power". Paul and Schwartz, *Federal Censorship: Obscenity in the Mail* 186. Nevertheless, the Post Office Department stated that it would press "the use of this new legislation to the fullest possible extent . . . to attempt to prevent the use of the mails for indecent material and to seek indictments and prosecutions for such offenses and even though it may be argued that it falls in the category of material concerning which there has been previous rulings favorable to the promoters". Subcommittee on Postal Operations of the Committee on Post Office and City Service, H. of Rep. 86th Cong., 1st Sess., Obscene Matter Sent Through Mail, 4-6 (Comm. Print 1959).

Michigan prosecution were found to be not obscene, and stated: "[W]hat the community of Los Angeles may have found not obscene may meet a different standard in Michigan. . . . One who chooses to carry on an enterprise which might indeed offend criminal statutes enforceable in places in which he proposes to carry on his enterprise, must take the hazards involved" (187 F. Supp. at 506-507).

In *United States v. West Coast News Co.*, 30 F.R.D. 13 (D.C. Mich. 1962), District Judge Starr, in denying a motion for transfer under Fed. Rules Crim. Proc. Rule 21(b), stated: "As intended by the Congress, a jury drawn from this district will be familiar with and best able to apply the local community standards in determining whether books were obscene and in violation of the statutes. It is obvious that a jury drawn from the southern district of California would not have knowledge of the community standards in this western district of Michigan. To grant defendants' motion . . . would deprive the citizens of the western district of Michigan of the opportunity to evaluate the books and determine whether they are obscene under local community standards." (30 F.R.D. at 19-20).

In denying a motion for reargument of the motion to transfer the proceedings, District Judge Fox in Grand Rapids, Michigan adhered to the views of Judge Starr and stated: " 'The common conscience of the community' is to be determined by a jury in the district in which the action is brought. It was the intent of Congress that this action could be brought in this district, where the material had been disseminated." *United States v. West Coast News Co.*, 216 F. Supp. 910, 926 (D.C. Mich. 1963).

In upholding the Grand Rapids judgments of conviction, the Court of Appeals for the Sixth Circuit stated: "We consider Judge Starr's opinion a quite adequate exposition of the rule that the involved motion was addressed to the discretion of the District Judge and a clear demonstration that his discretion was soundly exercised. . . . Appellants had no constitutional right to be tried in their 'home' state even though the crimes charged were committed there as well as in the State of Michigan where they chose to do business." *United States v. West Coast News Co.*, 357 F. 2d 855, 861 (6 Cir. 1966).

In *United States v. Luros*, 243 F. Supp. 160 (D.C. Ia. 1965), District Judge Hanson, in denying a motion for transfer of proceedings, stated:

> "The legislative history clearly indicates the intent of Congress in enacting the 1958 amendments to the obscenity statutes. . . . The strength of this congressional feeling is indicated by Congress' willingness to override the important policy considerations behind Rule 21(b). . . . These expressions of congressional intent are highly relevant both to the ultimate question of transfer and to the defendants' claim that the prosecution could have more properly been brought in another foreign forum. . . . In the present case, however, the defendants have made shipments and mailings and the materials named in the pending indictment to all parts of the country. Each of these numerous shipments and mailings could have provided the basis for a separate indictment." (243 F. Supp. at 176-177).

See also,

Toscano v. Olesen, 184 F. Supp. 296 (D.C. Calif. 1960), opinion by District Judge Yankwich.

3. This Court admonished in *Roth* that the door barring federal intrusion into the areas of speech and press must be kept "tightly closed" and opened only "the slightest crack" necessary to prevent encroachment upon more important interests. The substantial procedural changes made in the federal obscenity statutes by the 1958 Amendments permitting multiple venue prosecutions have, it is submitted, resulted in a wide opening of the door and in a substantial intrusion into protected expression. The operation and effect of the method by which the circulation of books and other writings is restrained by the federal obscenity statutes as amended should, it is submitted, be subjected to "close analysis and critical judgment" by this Court. *Speiser v. Randall,* 357 U.S. 513-520.

In a series of decisions, this Court held that different legal procedural devices which had the effect of inhibiting freedoms of speech and press could not be upheld; that a statute on its face which is clearly capable of many abuses threatening those who exercise their rights of free expression with the burdens of a criminal prosecution is invalid; and that where a statute in addition has a potentially inhibiting effect on the exercise of freedoms of speech and press, the statute is also constitutionally invalid because it fosters self-censorship and the denial of access by the public to constitutionally protected expression.[8]

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[8] *Smith v. California,* 361 U.S. 147; *Marcus v. Search Warrants of property,* 367 U.S. 717; *Quantity of Copies of Books*

Statutes which require publishers and national distributors of books, magazines and other media of expression to know at their peril the standards of each of the myriad communities throughout the Nation with respect to the depiction or representation of sex, nudity and excretion are patently vague, ambiguous and overbroad. They tend inevitably to force publishers and distributors to "steer far wider of the unlawful zone". *New York Times Co. v. Sullivan,* 376 U.S. 254, 279. See also, *Speiser v. Randall,* 357 U.S. 513, 526; *Times Inc. v. Hill,* 385 U.S. 374, 389.

This country is a "melting pot" of diverse political, social, economic, ethnic and religious bodies located in thousands of urban, rural and metropolitan areas. See, *Statistical Abstract of United States* (1967), U.S. Dept. of Commerce, 1-43 (88th Annual Ed.). Statutes which purport to incorporate the multifarious standards of all divergent communities throughout the Nation are patently incapable of objective measurement. Under such laws, books, magazines and all other media of expression face suppression by the "moment-to-moment opinions" of a government official (*Shuttlesworth v. Birmingham,* 382 U.S. 87, 90); by the subjective determination of individual jurors who often label as "obscene" material which they deem objectionable (*cf., Elfbrandt v. Russell,* 384 U.S. 11, 16); and such laws act as "a trap for the innocent" publishers

v. Kansas, 378 U.S. 205; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58; *Freedman v. Maryland,* 380 U.S. 51. See also, *New York Times Co. v. Sullivan,* 376 U.S. 254; *Dombrowski v. Pfister,* 380 U.S. 479; *Giaccio v. Pennsylvania,* 382 U.S. 366; *Elfbrandt v. Russell,* 384 U.S. 11; *N.A.A.C.P. v. Button,* 371 U.S. 415; *Baggett v. Bullitt,* 377 U.S. 360; *Ashton v. Kentucky,* 384 U.S. 195; *Keyishian v. Bd. of Regents,* 385 U.S. 589; *Whitehill v. Elkins,* 389 U.S. 54; *United States v. Robel,* 88 S. Ct. 419; *Zwicker v. Koota,* 88 S. Ct. 391.

and national distributors of constitutionally protected material (*Whitehill v. Elkins,* 389 U.S. 54, 60). Such statutes do violence to "the larger principle that the freedoms of expression must be ringed about with adequate bulwalks". *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66). Since the line between speech unconditionally guaranteed and speech which may legitimately be regulated is finely drawn, "the separation of legitimate from illegitimate speech" calls for more sensitive tools than is presented by 18 U.S.C. §§1461 and 1462, as amended. *Speiser v. Randall,* 357 U.S. 513, 525.

In view of the plain intention manifested by the Congress in the enactment of the 1958 Amendments to the federal obscenity statutes, it is submitted that the statutes have been rendered unconstitutionally vague, ambiguous and overbroad, and constitute a palpable deterrence to the exercise of freedoms of speech and press guaranteed by the provisions of the First Amendment.

4. (a) The opinion of the District Court (Appendix A) fails to answer, it is submitted, the crucial constitutional questions raised in the case herein. Relying upon cases decided under 18 U.S.C. §3237 upholding the power of Congress to regulate the mails and to determine venue for purposes of federal jurisdiction, the Court concluded that Congress could constitutionally designate as a continuing offense "the use of the mails for transporting obscene material" (Appendix A., p. 15). Reliance was placed on such decisions as *Hyde v. Shine,* 199 U.S. 62 and *Armour Packing Co. v. United States,* 209 U.S. 56.

The issue here however does not involve a conspiracy to defraud the United States by forged affidavits, or a prosecution for the offense of obtaining transporta-

tion in interstate commerce at less than the lawful rate, but involves the use of multi-venue statutes to prosecute for the offense of mailing or shipping books, magazines and other writings ordinarily protected from governmental abridgment by the First Amendment. This Court has held that statutory procedures involving freedoms of speech and press must be judged by standards stricter than those which affect activities outside of First Amendment areas. *Speiser v. Randall*, 357 U.S. 513; *Smith v. California*, 361 U.S. 147; *Marcus v. Search Warrants of Property*, 367 U.S. 717; *Quantity of Copies of Books v. Kansas*, 378 U.S. 205. The statutes, 18 U.S.C. §§1461 and 1462, as amended, inevitably compel a self-censorship by publishers and distributors throughout the Nation which seriously curtails the publication and distribution of all expression, whether entitled to constitutional protection or not.

(b) The District Court held that the injuries to publishers and distributors under the federal obscenity statutes, as amended, would be *de minimis* because, stated the District Court, "we are dealing with a *uniform* and constitutionally sufficient standard of what constitutes obscenity in a particular case, and while the criteria are uniform, uniformity of result cannot be guaranteed" (Appendix A, p. 19). Such a view, it is submitted, cannot bear critical scrutiny and analysis. It is of course possible that different juries in one particular locality may reach different results with respect to the same material, but it is quite another thing to argue that a publisher or distributor of books and magazines dealing with sex must take the risk of deciding whether or not juries in a thousand localities throughout the United States will reach a decision that the material is constitutionally protected. Such a burden is

an unreasonable and impossible one for publishers and distributors to assume. *Smith v. California,* 361 U.S. 147, 153. The constitutional difference is no less real, because, as is argued, a difference of degree only is involved.

In the second place, if a so-called uniform standard is being applied throughout the Nation, then the reason for the enactment of the 1958 Amendments is not apparent and constitutional issues are again raised. If a publisher or distributor with place of residence and business in a locality in California is to be subjected to prosecution before juries in far removed localities applying an alleged "uniform standard", then the only real purpose of the multi-venue statutes is to so harass and burden the publishers by arbitrary forum picking as to put such persons out of business. Such a purpose and consequence are incompatible with the requirements of the First Amendment. *Cf., New York Times Co. v. Sullivan,* 376 U.S. 254, 294-295; *Time, Inc. v. Hill,* 385 U.S. 374, 389.

In the third place, terms such as "contemporary community standards", "prurient interest", "social importance" and "hard core pornography" are concededly terms which are intrinsically vague and ambiguous. See, *Jacobellis v. Ohio,* 378 U.S. 184, 200; *Ginzburg v. United States,* 383 U.S. 463, 479-480. It is extremely doubtful that individual jurors in Grand Rapids, Michigan, Sioux City, Iowa, Houston, Texas, Phoenix, Arizona, or Honolulu, Hawaii, required to pass upon the alleged obscenity of a book like *Tropic of Cancer,* or *Fanny Hill,* or *Sex Life of a Cop,* can overcome their local prejudices and standards and arrive at some decision as to whether or not such writings, or sim-

ilar writings, conform to a national standard. As was stated by Mr. Justice Black in *Ginzburg* (383 U.S. at 480): ". . . But even if some definite areas were mentioned, who is capable of assessing 'community standards' on such a subject? Could one expect the same application of standards by jurors in Mississippi as in New York City, in Vermont as in California? So here again the guilt or innocence of a defendant charged with obscenity must depend in the final analysis upon the personal judgment and attitudes of particular individuals and the place where the trial is held. . . ." See also, Comment, "Multi-Venue and the Obscenity Statutes", 115 U. of Pa. L.Rev. 399-438 (1967); Abrams, "Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula", 9 U. of Calif. L.Rev. 751-818 (1962).

Moreover, it should be noted that the Government has always contended that it is not required to present any evidence of community standards in any obscenity prosecution, and that it is sufficient merely to place the material before the jury for its determination. Under the circumstances, it is a simple matter for a federal prosecutor who has picked his forum to stand before a jury, display the particular exhibits involved and merely ask in summation: " 'Would you want your son or daughter to see or read this stuff?' A conviction in every instance would be virtually assured." *United States v. Klaw,* 350 F. 2d 155, 170 (2 Cir. 1965). *Cf., United States v. Davis,* 353 F. 2d 614, 615-618 (2 Cir. 1965), *cert, den'd.* 384 U.S. 953.

5. In the First Amendment area, statutes which authorize unrestrained multi-venue prosecutions at the whim of federal prosecutors can only result in abridge-

ment of the exercise of freedoms of speech and press and the arbitrary and capricious deprivation of liberties without due process of law. Such an unlimited delegation of powers by Congress to officials in the Executive Department "creates the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of protected freedoms" (*United States v. Robel,* 88 S. Ct. 419, 428). The prosecutorial discretion is left at large under the statutes without any power in an accused publisher or distributor to review the exercise of that discretion. The broad Congressional delegation deepens the vice of ambiguity and indefiniteness in the statutes and renders the standards of guilt under the law totally unascertainable (88 S. Ct. at 428-433).

Moreover, the undisputed record here presented in these consolidated causes amply establishes in fact the harsh and unascertainable results which flow from the application of the federal obscenity statutes as amended in 1958. In *Aday, et al.,* the stipulated facts show that a trial was held in Fresno in the Southern District of California under a 3-count obscenity indictment in which the jury either acquitted or disagreed, and where the indictment finally was dismissed on the Government's own motion. Nevertheless, immediately upon the passage of the 1958 Amendments the Department of Justice picked Grand Rapids, Michigan to cause an indictment to be returned involving one of the very books in the Fresno trial which the Government had withdrawn from consideration by the jury. At or about the same time, the Government was picking Phoenix, Arizona and Honolulu, Hawaii to have other indictments returned and each of the indictments in-

volving, among other books, a single book, *Sex Life of a Cop,* ultimately determined by this Court to be constitutionally protected. In 1965, an indictment was again returned charging violations of 18 U.S.C. §§1461 and 1462, as amended, and this time, the indictment was laid in Houston, Texas. These various jurisdictions were thousands of miles away from the places of business and residence of the accused, and the trial in Grand Rapids, Michigan placed tremendous physical and financial burdens upon the accused in order to properly prepare their defenses.

In *Luros, et al.,* an indictment was returned in Ft. Dodge, Iowa and the trial took place in Sioux City, Iowa, again thousands of miles away from the places of business and residence of the accused. In the Ft. Dodge indictment, sixteen defendants in all, including California corporations, officers of the said corporations, individual employees, authors, and other personnel all from California, except one defendant from Oregon, were subjected to a conspiracy prosecution as well as to charges of substantive violations of 18 U.S.C. §§1461 and 1462, as amended. An entire enterprise was compelled to meet charges at enormous distances from the places of business and residence and compelled to transport records and witnesses and go through an extended trial under inordinate physical and financial burdens.

In *Reed Enterprises, et al.,* the 26-count indictment was returned in Houston, Texas, over 1,500 miles away from the places of business and residence and required an 8-week trial before a jury in which all the individual defendants and their five attorneys were

required to be present throughout, and at the end of which time the jury reported itself deadlocked.

The Department of Justice presented to the District Court a "statement of policy", but as the District Court rightly concluded: "Constitutional considerations need a more solid basis than variable policy (Appendix A, p. 15, n. 22). Moreover, the policy statement itself leaves plenty of room for the exercise of "prosecutorial discretion". It is stated that forum-picking will depend on "where the evidence adduced presents the strongest case for successful prosecution"; that choice will be made with "congressional policy behind the 1958 Amendment" in mind; and that the policy of the Department does not preclude prosecutions for the same or similar material occurring after "the first conviction". It is also stated that among the factors in deciding which forum to be picked is "which United States Attorney's office has expressed the greatest interest in the case". It is plain that the policy statement in no way removes the inherent infirmities contained in the statutes, and the policy statement itself is a clear recognition of the tremendous power which Congress has vested in federal prosecutors to engage in arbitrary and capricious forum-picking.

Finally, the argument that an accused under the statutes may resort to Rule 21(b) of the Fed. R. of Crim. Proc. is patently untenable. In the first place, as the rulings of the lower courts reveal motions for transfer of proceedings have constantly been denied in deference to the "Congressional policy" of measuring the validity of the charges by local community standards. In the second place, Rule 21(b) is in the last analysis based upon the exercise of a discretion and

cannot, therefore, mitigate the intrinsic vagueness, ambiguity and overbreadth of the statutes.

Conclusion.

It is submitted that the questions presented by this appeal are substantial and of public importance, requiring review by the Court.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

Opinion and Judgment of the District Court.

United States District Court for the District of Columbia.

Reed Enterprises, et al., Plaintiffs, v. Ramsey Clark, et al., Defendants. Civil Nos. 1744-65, 2562-65, 3009-65. Consolidated.

OPINION

David Rein, Esquire, of Washington, D.C., for plaintiffs.

Fred M. Vinson, Jr., Assistant Attorney General, C. Westbrook Murphy, Department of Justice, Theodore Kleinman, Department of Justice, David G. Bress, United States Attorney, of counsel, for the defendants.

Before TAMM, Circuit Judge, SIRICA, District Judge, and CORCORAN, District Judge.

CORCORAN, District Judge. The above numbered actions were consolidated since they raise identical constitutional issues for decision by a three-judge panel convened pursuant to 28 U.S.C. §§ 2282-2284.

In each case the plaintiffs originally sought the convocation of a three-judge court to secure injunctive and declaratory relief on grounds that a 1958 amendment to the venue provisions of the Federal Obscenity Statutes violated their constitutional rights.

In each instance the District Judge to whom application for a three-judge court was made denied the application on jurisdictional grounds. The convocation of this three-judge court followed successful appeals by the petitioners to the Court of Appeals. See *Reed En-*

terprises v. Corcoran (*Luros v. Sirica*), 354 F.2d 519 (D.C. Cir. 1965).

The precise issue before the Court is the constitutionality of the venue provision of the Federal Obscenity Statutes[1] as amended in 1958.[2]

I.
BACKGROUND

Title 18 § 1461 defines as nonmailable:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; . . ."

Prior to 1958 it further provided:

> "Whoever knowingly *deposits for mailing or delivery,* anything declared by this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both." (Emphasis added).

In 1958 for reasons hereinafter recited[3] the immediately foregoing language of § 1461 was amended by deleting "deposits for mailing or delivery" and substituting the phrase "uses the mails" so that the statute now reads in pertinent part:

> "Whoever knowingly *uses the mails* for the mailing, carriage in the mails, or delivery of anything

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[1]18 U.S.C. §§ 1461 and 1462 (1964). While § 1461 (mailing obscene or crime-inciting matter) is of primary concern and will be treated exclusively herein, § 1462 (importation or transportation of obscene matter) is also under attack by plaintiffs. However, because of the similarity of venue provisions any disposition concerning § 1461 will of necessity reflect upon the constitutional status of § 1462.

[2]Pub. L. 85-796, 72 Stat. 962.

[3]Pages 11-14, *infra.*

> declared by this section to be nonmailable . . ." (Emphasis added).

shall be guilty of a violation of the statute.

The intended effect of the 1958 amendment was to place the venue for obscenity prosecution within the purview of Title 18 U.S.C. § 3237 which read:

> "Any offense involving the *use of the mails,* or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted *in any district from, through, or into which such commerce or mail matter moves.*" (Emphasis added).

thus making the use of the mails for the dissemination of obscene matter a continuing offense from the time of deposit to the time of delivery and throughout transit.

The plaintiffs are distributors and publishers of books and magazines which, when considered in the light of the obscenity statute, have been characterized as "borderline or marginal material."[4]

In their original complaint for injunctive and declaratory relief they allege substantially that through application of the foregoing statutory provisions the representatives of the United States intend to and will commence and prosecute various criminal actions in District Courts throughout the United States; that such actions will necessarily involve plaintiffs in a multiplicity of legal proceedings and involve and threaten

[4]So characterized by plaintiffs' counsel during hearing on motion for summary judgment. See also stipulation of facts filed herein listing the several indictments and demonstrating the common theme which the material involved seeks to portray.

them with the destruction of their goodwill and property; that such actions will exhaust their financial and physical resources and thus make it impossible for plaintiffs to adequately defend against the aforesaid multiple criminal prosecutions; that such conduct will seriously diminish the circulation of plaintiffs' books and writings; and that accordingly plaintiffs will suffer substantial and irreparable loss and damage for which plaintiffs have no adequate remedy at law. Further the plaintiffs contend that the 1958 amendment, specifically incorporating a continuous offense doctrine of venue, permits arbitrary forum shopping by Federal prosecutors and the institution of multiple prosecutions for identical material in districts far removed from the residences and places of business of alleged violators. Such permissive forum shopping, it is claimed, constitutes an unlawful interference with and an abridgement and denial of the freedom of the press, in violation of the First Amendment; it deprives persons, including these plaintiffs of their liberty and property without due process of law, in violation of the Fifth Amendment; and finally it depriyes persons of their right to a fair trial in a criminal prosecution guaranteed by the provisions of the Sixth Amendment.[5]

Subsequent to convening this special court the parties stipulated to the pertinent facts underlying this dispute and a hearing was held at which oral argument was presented on cross motions for summary judgment and an alternative motion to dismiss for lack of jurisdiction pressed by the defendant.

In support of their motion for summary judgment the plaintiffs substantially narrowed the constitutional

[5] *Reed Enterprises v. Corcoran*, 354 F.2d 519, 520 (D.C. Cir. 1965).

issue before the Court to whether the provisions of 18 U.S.C. §§ 1461 and 1462 as amended in 1958 are unconstitutional on their face.

The reason for this position is clear. The plaintiffs can allege only a *potential* threat of prosecution in multiple districts and a *potential* objective of depriving them of their constitutional rights where no such activity is shown to exist now nor to have existed in the past since the 1958 amendment. This conclusion is borne out by the stipulated facts which show a total of seven corporations and fifteen individuals, parties plaintiff; and that since 1958 such plaintiffs have been subjected to only four criminal trials under the Federal Obscenity Statute. One case was prosecuted in the home state of the defendant; another originated in Houston, Texas, but was later removed to California,[6] the domicile of the defendant; a third case was conducted in Fort Dodge, Iowa; and the fourth case was tried in Grand Rapids, Michigan in May 1960. On motion by the accused in the Grand Rapids case for a change of venue the District Court upheld the constitutionality of 18 U.S.C. §§ 1461 and 1462.[7] A verdict of guilty and the District Court's ruling on venue were sustained by the Sixth Circuit Court of Appeals.[8]

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[6]Following a deadlocked jury in the Houston trial the case was removed to a California District pursuant to Rule 21b of the Federal Rules of Criminal Procedure.

[7]*United States v. West Coast News Company*, 30 F.R.D. 13 (D.C. W.D.Mich. 1962).

[8]*United States v. West Coast News Company*, 357 F.2d 855 (6th Cir. 1966). Subsequently reversed on other grounds, *sub nom. Aday, et al. v. United States*, 388 U.S. 447 (1967). On this same day the Supreme Court granted certiorari and summarily reversed twelve other obscenity cases which were pending before it by mere reference to *Redrup v. N.Y.*, 386 U. S. 767 (1967). In *Redrup* the Supreme Court reviewed the diversity

(This footnote is continued on the next page)

No criminal case involving these plaintiffs (or others) has been brought in this District in the past and no case involving these plaintiffs (or others) is now pending before this or any other court in this District.[9]

This historical record would seemingly justify a court in refusing to consider a challenge to the constitutionality of a statute as it might apply to a hypothetical situation. *Virginian Ry. Co. v. System Federation,* 300 U.S. 515 (1937); *Blackmer v. United States,* 284 U.S. 421, 442 (1932); *Jeffrey Mfg. Co. v. Blagg,* 235 U.S. 571, 576 (1914).[10]

This traditional concept of justiciability, however, must be subordinated in reaching the merits of the case under the developing standards of prior restraints upon First Amendment rights. See *Speiser v. Randall,* 357 U.S. 513 (1958); *Smith v. California,* 361 U.S. 147 (1959); *Dombrowski v. Pfister,* 380 U.S. 479 (1965); *NAACP v. Button,* 371 U.S. 415 (1963); *Reed Enterprises v. Corcoran, supra.*

II.

THE CONSTITUTIONAL ASPECTS OF VENUE

It should be initially noted that the Federal Obscenity Statutes with which we are here concerned are founded on the powers of Congress to exclude objectionable

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of opinion prevailing among members of the Court, as to what constitutes unprotected expression but found that no matter what test was applied the material before the Court was constitutionally protected.

[9]This was one of the jurisdictional grounds upon which the convening of a three-judge panel was originally denied.

[10]See references in similar context in *United States v. Frew,* 187 F. Supp. 500 at 507 (D.C. E.D. Mich., 1960) and *United States v. Wurzbach,* 280 U.S. 396, 399 (1930).

and non-constitutionally protected material from the mails. That Congress has the power to regulate the mails is well established, *Public Clearing House v. Coyne,* 194 U.S. 497 (1904). It is likewise well established that obscene, lewd, lascivious, etc. material is not constitutionally protected by the First Amendment, or any other constitutional safeguard. See *Roth v. United States,* 354 U.S. 476 (1957); *Jacobellis v. Ohio,* 378 U.S. 184 (1964); *Ginzburg v. United States,* 383 U.S. 463 (1966).

We approach the specific problem with those general concepts in mind.

Article III, § 2, Clause 3 of the Constitution reads in pertinent part:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; . . ."

The Sixth Amendment to the Constitution similarly provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ."

Neither the Constitution nor any principle of constitutional law entitles an accused to be tried in the place of his residence or domicile. If a crime has been committed against the United States the Constitution only requires that trial be conducted in a district where the crime was committed. *Haas v. Henkel,* 216 U.S. 462, 473-474 (1910).

Most Federal crimes involve some aspect of interstate or foreign commerce and usually involve multiple state or district contacts. The Federal offense may be committed partly in one state and completed in another, or it may be what is denominated a continuing offense, such as an offense involving the unauthorized use of the mails or otherwise transporting prohibited goods in interstate commerce.

Congress must accordingly determine where venue will lie for purposes of Federal jurisdiction under any given statute.[11] Silence on the part of Congress in any instance would only lead to chaos.

Thus in the enactment of the Elkins Act, 49 U.S.C. §§ 41-43 (1964), prohibiting transportation of goods in interstate commerce at rates less than those prescribed by regulated tariffs, Congress saw fit to include a venue provision to the effect that prosecution could be had in any district "in which such violation was committed or through which the transportation may have been conducted." The Supreme Court specifically upheld the concept of the continuing offense as a basis for determining venue (*Armour v. United States*, 209 U.S. 56 (1908).)[12] The Court commented (at p. 74) that "[W]hen it [the violation] takes place, whether in one district or another, whether at the beginning, at the end, or in the middle of the journey,

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[11]"The problem of laying and justifying venue in such cases has been severe and recurring." *Comment—Multi-Venue and the Obscenity Statutes*, 115 U. Pa. L. Rev. 399 (1967), citing Abrams *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 U.C.L.A. L.Rev. 751 (1962).

[12]This case also involved the most extreme aspects of this concept in terms of traditional notions of fair play and substantial justice—that of the intervening district venue.

it is equally and at all times committed." (Emphasis added).

The Court met head-on the objection of alleged serious hardship implicit in prosecutions in places distant from the home and remote from the vicinage of the accused by characterizing it as an "objection to the policy of the law, not the power of Congress to pass it. *Hyde v. Shine*, 199 U.S. 62, 78." *Armour Packing Co. v. United States, Id.* at 77.

But while the Supreme Court, in line with *Armour*, has not attacked the constitutional power of Congress to use the continuing offense concept, it has required a showing of a clear Congressional intent prior to applying the concept and has otherwise limited the choice of venue.

Thus in *United States v. Johnson*, 323 U.S. 273 (1944) the Court was called upon to construe the venue provision of the Federal Denture Act, 18 U.S.C. § 1821 (1964) which provided for prosecution for "sending" dentures through the mail. The Court seized upon what it considered the absence of a clear intent and restricted venue to the point where the dentures were actually deposited in the mail notwithstanding the existence of a general venue statute which would have permitted prosecution in another jurisdiction.

The holding of the Court in *United States v. Johnson* has been attributed to the distaste felt for the continuing offense concept; ". . . the Court was straining to find ambiguity in this particular statute . . ." (115 U. Pa. L. Rev. 399 at 418 (1967). But for all such distaste the Court never disputed the power of Congress to provide specifically for venue, stating, at page 275:

> "By utilizing the doctrine of a continuing offense, Congress may, to be sure, provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates. *Thus, an illegal use of the mails or of other instruments of commerce may subject the user to prosecution in the district where he sent the goods, or in the district of their arrival, or in any intervening district.*" (Emphasis added).

Because of possible hardship which such leeway engenders, leading to "appearance of abuses, if not to actual abuses, in the selection of what may be deemed a tribunal favorable to the prosecution" the Court required in *Johnson* and subsequent cases[18] a clear Congressional mandate. In *Johnson* Justice Frankfurter, speaking for the Court, recognized that such venue questions must be regarded as more than mere procedural matters and raise deep issues of policy considerations which "touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests." *United States v. Johnson, supra* at 276. *Accord, Travis v. United States,* 364 U.S. 631 (1961).

Following the *Johnson* decision, and having in mind the judicial restriction of clear intent there announced, Congress responded in 1948 by amending 18 U.S.C. §3237 to read as quoted on page 3.

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[18]U.S. v. Anderson, 328 U.S. 699 (1946). Where Congress is not explicit "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." at 703; *accord, Travis v. United States,* 364 U.S. 631 (1961) But where Congressional intent is specific, matters of possible hardship of trial away from the vicinage of the accused "neither allows nor requires judicial changes in the law of venue." *Johnston v. United States,* 351 U.S. 215 (1956).

The amendment was intended to remove all doubt as to the venue of continuing offenses and make a special venue provision unnecessary except in those cases where Congress wished to restrict the prosecution of offenses to a particular district. Offenses involving use of the mails and transportation in interstate commerce were clearly designated as continuing offenses.[14]

Notwithstanding the 1948 amendments, which seemingly resolved all ambiguity in cases involving use of the mails, the Tenth Circuit in 1953 in the case of *United States v. Ross* (205 F.2d 619 (1953) refused to apply the continuing venue concept to language in the then obscenity statute which proscribed the "knowing deposit for mailing or delivery of nonmailable material."

Ross held in effect that "deposit" was the key word in the obscenity statute which precluded the application of the continuing offense doctrine.

The practical result of *Ross* was that prosecution of Federal obscenity cases was thereafter largely confined to the major publishing centers of Los Angeles and New York. The character of material shipped country-wide was being determined in those allegedly liberal jurisdictions with attendant difficulties to successful prosecution. *Comment, Venue: Impact on Obscenity*, 11 So.D. L.Rev. 363 (1966) relying upon Lockhart and McClure, *Censorship of Obscenity: The Development of Constitutional Standards*, 45 Minn. L.Rev. 5, 36 (1960); see also Senate Report No. 1839, 85th Cong., 3 (1958).[15]

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[14]See notes following 18 U.S.C. § 3237 (1964), citing 80th Congress House Report No. 304.

[15]These problems were presented to the Congress during Hearings on Mailing of Obscene Matter before Subcommittee

(This footnote is continued on the next page)

The *Ross* roadblock to successful prosecution of obscenity cases led Congress to enact the 1958 amendments to the Obscenity Statute. The legislative history of those amendments leaves no doubt that what Congress was trying to do was to supply the specificity of intent required by the *Johnson* case and to avoid the impact of the *Ross* case.[16]

The House of Representatives initially passed a bill which provided for continuing offense language requested by the Post Office Department (House Report No. 2624). The Senate Bill limited prosecution to the place of deposit and place of receipt.[17] (Senate Report No. 1839, 85th Cong., 2d Sess. 3 (1958)). The disagreement was resolved in Conference where the House version was adopted.

The Conference Report contained the following summary:

> "It is the position of the Post Office Department that the crime of sending obscene matter through the mails is a *continuing crime* from the point of deposit, in transit, and at the point of

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No. 1 of the House Committee on the Judiciary, 85th Cong., 2d Sess. 8 (1958) in the following terms:

> "Difficulties in prosecuting violators resulting from liberal attitudes of courts and juries—particularly in certain metropolitan areas, notably Los Angeles and New York—have established virtual sanctuaries allowing dealers in publications devoted exclusively to distorted sex to operate in defiance of the Post Office Department's best effort to bar their use of the mails or bring them to justice."

[16]See summary of legislative history in *United States v. West Coast News Co.*, 30 F.R.D. 13 at 18-19 (1962).

[17]The Senate originally took what it considered the "middle view" between *Ross* and the House passed bill on the ground that it considered that unrestricted "forum shopping" could lead to abuses and is therefore against public policy. But even the Senate recognized the need for expansion of venue and was initially willing to authorize limited "forum shopping."

delivery. The House concurred in the position of the Post Office Department. However, it appears that the Senate amendment of the venue provision would destroy the nature of the continuing offense. Furthermore, the striking out of the provision for the prosecution of the offense in the jurisdiction through which the obscene matter passes is contrary to the intent of Congress as expressed by the law in section 3237 of title 18, United States Code." (Emphasis in original). Statement of the Managers on the part of the House accompanying H.R. 6239 (House Report No. 2624 at page 3, 85th Cong., 2d Sess. (1958)).

More pointedly, it was said in debate:[18]

"The interpretation given by the courts has, to all intents and purposes, nullified previous congressional action. They have said a promoter can be prosecuted only where he puts the material into the mail. As a result the community most affected by the crime, that is, the one where the stuff is circulated, has no opportunity whatsoever to protect itself.

"The bill before us, is intended to overcome the effect of judicial interpretation and thereby to increase materially the effectiveness of the present statute. Its purpose is to make it abundantly clear that violators can be prosecuted either at the place of mailing, or at the place of address or delivery, or in any judicial district through which the objectionable matter is carried in the mails.

* * * * *

[18]Congressional Record, Vol. 104, No. 78, pp. 8043-8046, May 19, 1958.

> "There is nothing for anyone to fear in the enactment of this legislation except those who seek profit from pornography and immorality. Merely to permit the moral, God-fearing members of the community to pass judgment upon purveyors of filth who would destroy the homes of a community and the morals of the juveniles who reside therein, should strike fear in no one's heart other than those who fear justice and the loss of degrading profit in human misery."

From the foregoing it can readily be seen that the concept of continuing offense is not an innovation; rather it is an aged concept which has been upheld by the Supreme Court in several cases. It is undisputed that the Congress, having the power to control the use of the mails, has unequivocally manifested its intent that obscene material be excluded from the mail and other agencies of interstate commerce. And, while the Supreme Court has noted issues of public policy, possible hardship and burden[19] in considering questions of venue, it has never questioned the power of Congress to designate proscribed offenses as continuing offenses by regulation of the use of agencies of interstate commerce.[20]

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[19]The plaintiffs' allegations of hardship must also be considered in light of the availability of an effective remedy in Rule 21b of the Federal Rules of Criminal Procedure. This rule was designed specifically for the purpose of alleviating unnecessary hardship and provides for a change of venue when in the discretion of the judge such a change would be in the interests of justice.

[20]As stated by Mr. Justice Douglas speaking for the majority in *Travis v. United States:* "The use of agencies of interstate commerce enables Congress to place venue in any district where the particular agency was used" 364 U.S. 631 at 634 (1961).

While these concepts of venue as developed have been criticized, even critics have conceded that "the continuing offense concept has become securely engrained in the administration of federal criminal law and the constitutionality of the concept itself, as opposed to its application in a particular area of criminal law, would appear to be no longer open to attack." 115 U.Pa. L.Rev. 399 at 423 (relying in substantial part on Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 U.C.L.A. L.Rev. 751 at 816).

On the basis of the foregoing this Court must conclude (as has every court which has had occasion to consider the question similarly concluded)[21] that the use of the mails for transporting obscene material clearly constitutes an activity which Congress may constitutionally designate a continuing offense and that such designation does not violate the Sixth Amendment venue provision of the Constitution.[22]

III.

PRIOR RESTRAINT AND DUE PROCESS

We consider now the plaintiffs' contentions that the venue provisions constitute a "prior restraint" upon freedom of expression in violation of the First Amend-

[21] *United States v. West Coast News Co., supra*, reversed on other grounds, 388 U.S. 447 (1967); *U.S. v. Luros*, 243 F. Supp. 160, 167-168; *U.S. v. Frew*, 187 F. Supp. 500 (E.D. Mich. 1960); *Toscano v. Olesen*, 184 F. Supp. 296 (S.D. Calif. 1960). See also *U.S. v. Sorce*, 308 F.2d 299 (4th Cir. 1962) where the court sustained a similar venue provision of the Mail Fraud statute (18 U.S.C. 1341).

[22] The Court finds no necessity to bolster this conclusion by reference to affidavits, submitted by the Government, that it is the stated policy of the incumbent Attorney General not to invoke *in transitu* jurisdiction. Constitutional considerations need a more solid basis than variable policy.

ment as well as violating the due process requirements of the Fifth Amendment. The substance of the plaintiffs' claim is that the existence and potential use of the power to select venue in criminal obscenity prosecutions has an *in terrorem* effect which may intimidate people from exercising First Amendment rights, thus depriving the public of access to protected publications. More particularly the plaintiffs argue that it is difficult at best to defend in the field of obscenity where the standards and concepts are vague, but when additionally a publisher or distributor of publications is required to meet not only the economic challenge of defense away from home, but as well the uncertainty that is implicit when juries in varying jurisdictions are required to define what is obscene, the combination of burdens and vagueness necessarily results in an unconstitutional restraint upon the activities of the publishers or distributors. This combination of factors, it is urged, could well induce a person to engage in self-censorship and thus restrict the public's access to protected publications.

The strict standards by which statutes affecting First Amendment rights must be measured have been set forth in numerous cases decided by the Supreme Court within the last ten years, many of which are relied upon by the plaintiffs to sustain their position.[23] And it is apparent from some of those cases that the Supreme Court, when confronted with statutes regu-

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[23] *Speiser v. Randall*, 357 U.S. 513 (1958); *Smith v. California*, 361 U.S. 147 (1959); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58 (1963), *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Dombrowski v. Pfister*, 380 U.S. 79 (1965).

lating expression and involving possible imponderables that may inhibit the full exercise of First Amendment freedoms, has relaxed some of the procedural prerequisites to the assumption of jurisdiction. *Smith v. California,* 361 U.S. 147 (1959). Under certain limited conditions the mere threat of criminal prosecution or other sanctions by the Government without necessary safeguards for exercise of a First Amendment freedom has been sufficient to justify court intervention especially when the statute has presented a potential "chilling effect" on protected expression. *NAACP v. Button,* 371 U.S. 415 (1963); *Dombrowski v. Pfister,* 380 U.S. 479 (1965), *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963). See also *Reed v. Corcoran, supra.*

However, rights guaranteed by the First Amendment like all individual rights, are not absolute and all legislative enactments which touch upon First Amendment rights or have some ancillary effect upon free expression need not be and have not been declared unconstitutionally void. This is especially true, as the Supreme Court noted in *Speiser v. Randall,* where there is "no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern." 357 U.S. at 527. See also *United States v. Harriss,* 347 U.S. 612 (1954). This principle was relied upon in *Roth v. United States,* 354 U.S. 476 at 484 (1957), when the Court stated:

> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, *unless excludable because they encroach upon the limited area of more important interests.*" (Emphasis added).

This Court, of course, must closely and carefully scrutinize procedural safeguards especially "[W]hen we deal with the complex of strands in the web of freedoms which make up free speech." (*Speiser v. Randall,* 357 U.S. 513, 520-526 (1958)). It is fully cognizant of the fact that it is dealing with a limited and uncertain area of permissible Government activity and that the Government "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant,* 367 U.S. 717-731 (1961).

However, while many of the cases cited by plaintiffs provide some guidance in the application of a constitutional standard, of themselves they are not controlling in the disposition of the present case.

In the first place we are not confronted here with any direct "prior restraint" upon free speech or any procedure restraining dissemination of materials prior to a judicial determination of their constitutional status. The application of the venue statute obviously occurs only after dissemination. And as to the indirect threat of prosecution which is implicit in any criminal statute, it, of course, is a purely subjective matter—what one man would consider a threat may not be a threat to another. Certainly there is no basis for a conclusion that the threat of criminal prosecution is materially increased merely because the prosecution may be brought in one of several districts.

Accordingly we cannot conclude that the "threat" of prosecution of any defendant is any greater since passage of the 1958 amendment than that "threat" may have been before enactment. It can only be hypoth-

esized that the chances of successful prosecution at the trial level may be somewhat more favorable to the Government if it has a choice of venue. But in that connection it must be noted that we are dealing with a *uniform* and constitutionally sufficient standard of what constitutes obscenity in a particular case, and while the criteria are uniform, uniformity of result cannot be guaranteed. (*Roth v. United States,* 354 U.S. 476 (1957)).

Prior to the enactment of the multi-venue provisions the Supreme Court upheld the constitutionality of the Federal Obscenity Statute in *Roth, supra,* (*Albert v. California*). In *Roth* the issue was specifically whether the Federal obscenity statute violated the First, Fifth, Ninth and Tenth Amendments. The Court held that obscenity is not within a constitutionally protected area. Accordingly the Federal statutes when applied "according to the proper standard for judging obscenity do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." (*Roth, supra,* at 492).

In *Roth* and in subsequent decisions dealing with attempts to define and establish obscenity standards[24] the Supreme Court has recognized that inevitably, all criminal statutes have some deterrent effect, and criminal statutes regulating constitutionally unprotected expression are no exception. The " 'Constitution does not

[24]Mr. Chief Justice Warren described the problem of what constitutes obscenity as "increasingly muddled and difficult for the federal and state courts and legislators to understand since we first defined the reach of the First Amendment in this area in *Roth v. United States,* 354 U.S. 476 (1957)" *Jacobs v. New York,* 388 U.S. 431 at 434 (1967). (Dissenting opinion).

require impossible standards'; all that is required is that the [statutory] language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . .'" * * * "'That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . .'" *Roth, supra,* at 491-492, quoting from *United States v. Petrillo,* 332 U.S. 1, 7. The *Roth* opinion further notes that:

> ". . . [I]t is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." (At 492 note 30).

It was the concern of the Supreme Court for protecting the fundamental freedoms of speech and press and the possibility of encroachment that led it to find that it was "vital that the standards for judging obscenity safeguard . . . material which does not treat sex in a manner appealing to prurient interest." *Roth, Id.* at 488. Correspondingly the Court noted that "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the *universal judgment that obscenity should be restrained,* . . ." *Id.* at 484-485. (Emphasis added).

In light of the undisputed and unavoidable ancillary effect which any criminal statute has upon proscribed conduct or expression this Court agrees with the Government's characterization that the appropriate question is not whether 18 U.S.C. §§ 1461 and 1462, as amended, induce self-censorship but rather whether the

1958 venue amendment increased the existing pressures toward self-censorship to a constitutionally unacceptable degree.

Considering the Supreme Court's ruling in *Roth* that the obscenity standards are constitutionally sufficient to protect a person and place him on notice that a crime is being committed; and recognizing that such standards are uniformly applied; and believing that if a publisher is going to feel restrained, it will be out of fear of *any* prosecution rather than fear of prosecution in other than his home district, this Court must conclude that the venue amendments are constitutional on their face.

Any increase in apprehension which may accrue on a purely subjective basis by reason of the injection of a multi-venue provision is at most ancillary and *de minimus*. Such apprehension is only a concomitant of any criminal law and is susceptible to being raised regardless of the existence of multiple venue provisions.

As one court, which has also sustained this same venue provision noted:

> "One who chooses to carry on an enterprise which might indeed offend criminal statutes enforceable in places in which he proposes to carry on his enterprise, must take the hazards involved. *U.S. v. Wurzbach,* 280 U.S. 396, 399. It is not the duty of the court in enforcing the law or of Congress in enacting statutes to advise in advance the likely reaction of juries in each community in which an individual chooses to carry on his activities." *U.S. v. Frew,* 187 F. Supp. 500, 507 (E.D. Mich., 1960); also quoted in *U.S. v. West Coast News Company,* 30 F.R.D. 13 at 21 (1962).

The plaintiffs rely heavily upon *Jacobellis v. Ohio,* 378 U.S. 184 (1964) to discredit the multiple venue provision. The gist of their argument is that when Congress enacted the 1958 venue amendments it did so with the specific intent of causing obscenity to be litigated in the communities where the impact of the alleged obscenity was felt—that is, according to the local community standard—but that *Jacobellis* creates a national standard so that legislation enacted with a view to applying a local standard is of necessity unconstitutional. But this conclusion is not warranted under the present state of the law.[25] The question of national versus community or other standards has not yet been determined,[26] and particularly as concerns venue the Supreme Court itself has noted that the 1958 amendments have no effect on determining the community standards to be apply [sic.] in obscenity cases. *Manual Enterprises v. Day,* 370 U.S. at 488 (n. 10). Accordingly it would seem that the plaintiffs have placed undue reliance on the *Jacobellis* decision, and certainly they have not demonstrated the unconstitutional purposes of the 1958 amendments through their interpretation of that case. The Court accordingly rejects this contention.[27]

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[25]While the court has on occasion made reference to a national contemporary community standard as opposed to a local contemporary community standard, a majority of the court has never agreed with this proposition. See *Manual Enterprises v. Day,* 370 U.S. 478 (1962); *Jacobellis v. Ohio, supra.*

[26]See petition for certiorari filed 6/28/67 in Case No. 430, *K. I. Distributors v. New York* (36 LW 3102) where the question of contemporary community standards is specifically raised.

[27]The argument advanced by plaintiffs is but another challenge to the vagueness in the existing manner of determining when material falls outside of protected expression. This we have already considered and rejected as grounds for attack upon this statute.

It not being necessary to this decision, this Court will not embroil itself in a discussion of the variable as opposed to the constant concept of obscenity as most recently enunciated in *Ginzburg v. United States*, 383 U.S. 463 (1966). See also, Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L.Rev. 5 (1960).

The motion of the defendants for summary judgment is granted. The plaintiffs' motion for summary judgment and the defendants' motion to dismiss are denied. It is so ordered.

/s/ EDWARD A. TAMM
Edward A. Tamm
United States Circuit Judge

/s/ JOHN J. SIRICA
John J. Sirica
United States District Judge

/s/ HOWARD F. CORCORAN
Howard F. Corcoran
United States District Judge

Dated: October 26, 1967.

APPENDIX B.

Opinion of the Court of Appeals on Mandamus.

United States Court of Appeals, for the District of Columbia Circuit.

Reed Enterprises, *et al.*, Petitioners v. The Honorable Howard F. Corcoran, Judge of the United States District Court for the District of Columbia, Respondent. No. 19,677.

Milton Luros, *et al.*, Petitioners v. The Honorable John J. Sirica, Judge of the United States District Court for the District of Columbia, Respondent. No. 19,722.

On Petitions for Writs of Mandamus.

Decided December 2, 1965.

Mr. David Rein for petitioners.

Mr. Frank Q. Nebeker, Assistant United States Attorney, with whom *Messrs. John C. Conliff, Jr.*, United States Attorney at the time of argument, and *Jerome Nelson,* Assistant United States Attorney, were on the pleadings, for respondents.

Before Fahy, Wright and Leventhal, *Circuit Judges.*

Wright, *Circuit Judge:* In these mandamus proceedings,[1] petitioners request issuance of writs requiring that respondents take the necessary steps to have convened three-judge District Courts under 28 U.S.C. § 2284. They assert that in spite of the allegations, in the complaints filed below, of the unconstitutionality of 18 U.S.C. §§ 1461 and 1462 as amended in 1958, Pub.L. 85-796, §§1-2, 72 Stat. 962, and irreparable damage which would result from enforcement of these

[1] 28 U.S.C. § 1651.

statutes as to them, respondents have refused to comply with the procedures required by 28 U.S.C. § 2284 to have three-judge District Courts consider the applications for injunction against the Attorney General of the United States and his nominees.

In their complaints filed in the District Court, petitioners allege that they are distributors and publishers of books and magazines, and that the representatives of the United States "intend to and will commence and prosecute various criminal actions in the District Courts throughout the United States purportedly authorized under Title 18, United States Code, Sections 1461 and 1462, as amended. Such actions by defendants will necessarily involve plaintiffs in a multiplicity of legal proceedings; involve and threaten them with the destruction of their good-will and property; and exhaust their financial and physical resources and thus make it impossible for plaintiffs to adequately defend against the aforesaid multiple criminal prosecutions. Such conduct will seriously diminish the circulation of plaintiffs' books and writings, and plaintiffs will suffer substantial and irreparable loss and damage for which plaintiffs have no adequate remedy at law."

The particular part of the statutes on which the petitioners rely for the issuance of an injunction against their enforcement "purport[s] to permit the prosecution of alleged violators at either the place of mailing or at the place of delivery or at any other place through which material passes, thus allegedly authorizing arbitrary forum-picking by federal prosecutors and the institution of multiple prosecutions for identical material in districts far removed from the residences and places of business of alleged violators." This statutory

permission for forum-picking, according to petitioners, "constitutes an unlawful interference with and abridgement and denial of the freedom of the press, in violation of the First Amendment; deprives persons, including these plaintiffs, of their liberty and property without due process of law, in violation of the Fifth Amendment; and deprives persons of their rights to a fair trial in a criminal prosecution guaranteed by the provisions of the Sixth Amendment."

18 U.S.C. §§ 1461 and 1462 prohibit the mailing, importation and transportation of obscene matter. Before the 1958 amendment, § 1461 was upheld against constitutional attack based on First, Fifth, Ninth and Tenth Amendment grounds. *Roth v. United States,* 354 U.S. 476 (1957). Venue for the prosecution in *Roth* was the place where the material was mailed, the prior case of *United States v. Ross,* 10 Cir., 205 F.2d 619 (1953), having held, in spite of the "continuing offense" language in 18 U.S.C. § 3237, that venue under these statutes was proper only at the place of mailing.

It was to reverse the *Ross*-imposed limitation on venue under the obscenity statutes that Congress passed the 1958 amendment. In passing this amendment, the Congress rejected a Senate proposal which would have limited the extension of venue under §§ 1461 and 1462 to the place of delivery. The final form of the bill contained the broader language proposed by the House: "Whoever knowingly uses the mails * * *" Thus, as amended, venue under these statutes is proper, not only at the place of mailing and delivery, but in any district through which the allegedly obscene matter travels. See 1958 U. S. Code Cong. & Ad. News 4017. It is the

constitutionality of the amendment which is under attack in these proceedings.

The Government seeks dismissal of these applications for writs of mandamus on grounds that a long line of Supreme Court cases has affirmed the constitutionality of "continuing offense" venue provisions in criminal statutes[2]; that the constitutionality of the 1958 amendment to the obscenity statutes can be tested in the criminal proceedings which have already been brought in the districts of delivery of the allegedly obscene matter; and that the allegations of harassment by multiple prosecutions in venues permitted under the 1958 amendment are untrue.

The problem presented as to whether the convening of three-judge District Courts is required in these cases divides itself into three parts: (1) the presence or absence of a substantial constitutional question; (2) the necessity for injunctive relief; and (3) the presence or absence of a case or controversy. We shall consider these issues seriatim.

I

Since *Roth* has settled the constitutionality of the obscenity statutes prior to the 1958 amendment, we need only consider the effect of that amendment. Petitioners allege, with substantial support from the Supreme Court, that prosecutions involving possible collision with First Amendment rights are not subject to the routine consideration given prosecutions under

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[2]Citing *Armour Packing Co. v. United States*, 209 U.S. 56, 73-77 (1908) (transportation of goods at illegal freight rates); *United States v. Johnson*, 323 U.S. 273, 274-276 (1944) (using mails for wrongful sending of dentures); *United States v. Cores*, 356 U.S. 405, 408 (1958) (alien crewman remaining in United States beyond time permitted by conditional landing permit).

ordinary criminal statutes.[3] "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. * * * The separation of legitimate from illegitimate speech calls for more sensitive tools * * *." *Speiser v. Randall,* 357 U.S. 513, 525 (1958). Moreover, it is not clear that the standard to be applied to material challenged as obscene is a national one or one that may vary from district to district.[4] In this context, the question as to whether the prosecution may constitutionally be allowed a multiple choice of forum acquires added importance.

There can be no doubt that the purpose of the 1958 amendment was to provide the prosecution a multiple venue choice to facilitate successful prosecution. The General Counsel of the Post Office Department, which sponsored the amendment, advised the Congress that the need for reversing the *Ross* decision which limited venue under §§ 1461 and 1462 to the district of mailing arose from "the fact that it is sometimes difficult to obtain a conviction for the mailing of obscene matter in certain jurisdictions. In the Ross case, above, the defendant had mailed pictures of nude females in one

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[3]In *Smith v. California,* 361 U.S. 147 (1959), the Supreme Court reversed a conviction of a bookseller under a Los Angeles ordinance which did not contain the element of *scienter.* In so doing the Court stated:

> "* * * Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it. * * *" *Id.* at 150-151.

[4]See the various opinions in *Jacobellis v. Ohio,* 378 U.S. 184 (1964).

State for delivery in another State. In the judicial district where the pictures were mailed, the court held that the pictures were not obscene * * *." Letter to Chairman of House Judiciary Committee, 1958 U. S. Code Cong. & Ad. News 4014-4015.

While obscenity is without constitutional protection, "[a]ll ideas having even the slightest redeeming social importance" come within the First Amendment guaranty. *Roth v. United States, supra,* 354 U.S. at 484. The question in each case as to whether a particular publication is obscene is a mixed one of law and fact. The Supreme Court in *Roth* held that it was a question which should be submitted to the jury to be determined under proper instructions. 354 U.S. at 489-490. Under the circumstances, again the importance of venue is obvious. Where the prosecution is brought may very well determine whether the books and magazines are obscene or constitutionally protected.

While we do not, of course, intimate any opinion as to the constitutionality of the 1958 amendment, an attack on a statute which would permit the prosecution a multiple choice of venue in this protected area of First Amendment freedoms is not patently frivolous. Such choice could induce the publisher to engage in self-censorship and thus restrict the public's access to protected publications. "Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombrowski v. Pfister,* 380 U.S. 479, 494 (1965).

We find that the complaints filed in the District Court raise a substantial question as to the constitutionalty of the 1958 amendment.

II

The traditional basis for injunctive relief is, of course, irreparable harm and inadequacy of legal remedies. *Beacon Theatres v. Westover,* 359 U.S. 500, 506-507 (1959). Ordinarily, in injunction proceedings seeking to restrain enforcement of an allegedly unconstitutional statute, once a substantial question of constitutionality is raised and the complaint "at least formally alleges a basis for equitable relief," a three-judge court is required. *Idlewild Liquor Corp. v. Epstein,* 370 U.S. 713, 715 (1962). Here the allegations in the complaints unquestionably outline a basis for equitable relief. For the purpose of determining whether three-judge courts are required, these allegations, unless obviously colorable, must be taken as true, and the answers of the Government addressed to three-judge courts. *Ibid.* See also *Schneider v. Rusk,* 372 U.S. 224 (1963). Compare *Pierre v. Jordan,* 9 Cir., 333 F.2d 951, 956-957 (1964), *cert. denied,* 379 U.S. 974 (1965).[5]

Petitioners allege that the multiplicity of legal proceedings which the Government intends to bring will destroy their businesses, exhaust their financial resources, and make it impossible to defend themselves. In argument and brief they point to the fact that they are already under indictment far from their homes and businesses, and cite other cases where a single publisher has been charged under the same statutes in several different places.[6] If these allegations can be supported by evidence, irreparable damage appears patent.

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[5]See Note, *The Three-Judge District Court: Scope and Procedure Under Section* 2281, 77 Harv. L. Rev. 299, 309 (1963).

[6]Petitioners' brief, at page 7, reads:

"* * * Thus, a Fresno publisher, who was vindicated in a proceeding on an indictment in Fresno, the place of mail-

The Government's suggestion that petitioners have an adequate remedy at law in the criminal proceedings now pending against them, while perhaps appropriate in cases outside the First Amendment area where a single prosecution is contemplated, is unavailing here. The Government has not even denied that it contemplates multiple prosecutions. In affidavits supporting its answer filed in the District Court in opposition to the applications for preliminary injunction, it is merely stated: "The Department of Justice has not taken any action with respect to plaintiffs which is intended to harass the plaintiffs or to abridge any freedoms to which they are entitled." Moreover, under some circumstances even a single "criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. * * * The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases." *Dombrowski v. Pfister, supra,* 380 U.S. at 486. Compare *Terrace v. Thompson,* 263 U.S. 197, 216 (1923).

III

The Government's argument that the applications for three-judge courts were properly denied because the litigation in the District Court did not present a case or controversy within the meaning of Article 3 of the

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ing (*U.S. v. Aday* Fresno, No. 34-45 N.D. Crim 1958) was, after the amendment to 38 [*sic*] U.S.C. §1461, indicted in Arizona (*U.S. v. Aday,* No. C-15596, Phoenix), Grand Rapids, Michigan. (*U.S. v. Aday,* Cr. No. 6615, Western District of Michigan, Southern Division), Honolulu (*U.S. v. Aday,* Cr. No. 11510, District of Hawaii), and Houston, Texas (*U.S. v. Aday,* Southern District of Texas, Houston Division, Criminal No. 65-H 80). * * *"

Constitution is predicated primarily on our opinion in *Lion Manufacturing Corporation v. Kennedy,* 117 U.S.App.D.C. 367, 330 F.2d 833 (1964). There, in an action to enjoin enforcement of the Slot Machine Act of 1951 as amended by the Gambling Devices Act of 1962, 15 U.S.C. §§ 1171-1178, we held that an application for a three-judge court was properly denied, the District Court being without jurisdiction since the complaint stated no case or controversy. In *Lion,* "[i]t is nowhere alleged that the Attorney General, or anyone acting for him, has taken steps to initiate criminal prosecutions against plaintiffs or to require registration, nor that threats to this effect have been directed to plaintiffs." 117 U.S.App.D.C. at 372, 330 F.2d at 838. The factual difference between *Lion* and these cases is manifest.[7] Moreover, *Lion* is not concerned with the protected area of First Amendment freedoms. Where the plaintiff complains of chills and threats in the protected First Amendment area, a court is more disposed to find that he is presenting a real and not an abstract controversy.

We conclude that there is indeed presented a case or controversy within the intendment of Article 3 in each of these cases, and that under 28 U.S.C. § 2284 three-judge District Courts are required to hear them.

IV

We come at last to the propriety of review by this court of the district judges' refusal to convene three-judge courts. The fact that a Court of Appeals has no jurisdiction to hear an appeal on the merits in a

[7]For a case clearly pointing up the difference between a justiciable controversy and a request for an advisory opinion, see *United Public Workers v. Mitchell,* 330 U.S. 75, 86-94 (1947).

three-judge case, 28 U.S.C. § 1253, was for a time thought to be inconsistent with any review by that court of a district judge's failure to convene a three-judge court. In *Idlewild Liquor Corp. v. Epstein, supra,* however, the Supreme Court put an end to that misconception, and denied that "a court of appeals is powerless ever to give any guidance when a single judge has erroneously invaded the province of a three-judge court. The Court of Appeals clearly stated its opinion that a court of three judges ought to have been convened to consider this litigation. That view was correct and should have been followed upon the petitioner's renewed motion that such a statutory court be impaneled." 370 U.S. at 716.

Three-judge District Courts should have been convened to hear these cases. No final action will now be taken, however, on the petitions for writs of mandamus, as we assume that the respondents will take appropriate action in requesting three-judge courts pursuant to § 2284(1). See *Svejkovsky v. Tamm,* 117 U.S.App.D.C. 114, 326 F.2d 657 (1963).

An appropriate order will issue in each case.

Fahy, *Circuit Judge,* concurs in the result and in Part IV of this opinion.

APPENDIX C.

Constitutional Provisions, Statutes, and Rules Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .".

2. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .".

3. The provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

4. The provisions of Article I, §1 of the United States Constitution are:

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

5. The pertinent provisions of Article I, §8 of the United States Constitution are:

"The Congress Shall Have Power . . .

* * *

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

"To establish Post Offices and post Roads;

* * *

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. * * *

6. The pertinent provisions of Article III, §2 of the United States Constitution are:

* * *

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

7. The 1958 amendments to 18 U.S.C. §§1461 and 1462 [Pub.L.85-796, §§1-2, 72 Stat.962] are:

AN ACT

To amend sections 1461 and 1462 of title 18 of the United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the eighth paragraph of section 1461 of title 18 of the United States Code is amended to read as follows: "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

Sec. 2. (a) The first paragraph of section 1462 of title 18 of the United States Code is amended to read as follows:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commarce—".

(b) That paragraph of such section 1462 which begins with the words "Whoever knowingly takes" is amended to read as follows: "Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—".

(c) The last paragraph of such section 1462 is amended to read as follows: "Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

Approved August 28, 1958.

8. The entire provisions of 18 U.S.C. 1461, as amended (June 25, 1948, c. 645, 62 Stat. 768; June 28, 1955, c. 190, §§ 1, 2, 69 Stat. 183; August 28, 1958, Pub. L. 85-796, §1, 72 Stat. 962), are:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

"Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

"Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

"Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of any-

thing declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction, thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination."

9. The entire provisions of 18 U.S.C. 1462, as amended (June 25, 1948, c. 645, 62 Stat. 758; May 27, 1950, c. 214 §1, 64 Stat. 194; August 28, 1958, Pub. L. 85-796, § 2, 72 Stat. 962), are:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

"Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000, or imprisoned not more than ten years, or both, for each such offense thereafter."

10. The provisions of 18 U.S.C. §3237(a) [Act of June 25, 1948, Chap. 645, 62 Stat. 826; Pub.L. 85-595, 72 Stat. 512] are:

"Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed:

"Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any

district from, through, or into which such commerce or mail matter moves."

11. The provisions of Rule 18 of the Federal Rules of Criminal Procedure provide:

"Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

12. The provisions of Rule 21(b) of the Federal Rules of Criminal Procedure provide:

"For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceedings as to him or any one or more of the counts thereof to another district."

APPENDIX D.

Stipulation of Facts.

United States District Court, for the District of Columbia.

Reed Enterprises, et al., Plaintiffs, v. Ramsey Clark, et al., Defendants. Civil Action No. 1744-65.

Milton Luros, et al., Plaintiffs, v. Ramsey Clark, et al., Defendants. Civil Action No. 2562-65.

Sanford Elestel Aday, et al., Plaintiffs, v. Ramsey Clark, et al., Defendants. Civil Action No. 3009-65.

STIPULATION

The parties hereto, by their counsel, stipulate and agree as follows:

I.

Civil Action No. 3009-65

1. The plaintiff West Coast News Company, Inc. is a California corporation, with its principal office in Fresno, California. The plaintiffs Sanford Elestel Aday and Wallace De Ortega Maxey both reside and work in Fresno, California.

2. The plaintiff Sanford Elestel Aday was indicted on April 2, 1958, in the United States District Court for the Southern District of California, Northern Division (Fresno) for three alleged violations of Title 18, United States Code, Section 1461. Eleven pocketbooks were involved in the prosecution, the titles of which were: "Turbulent Daughters," "Taxi Dancers," "The Black Night," "Tainted Wife," "Dark Quarters," "Rene," "Rambling Maids," "Violent Surrender," "The Strange Three," "Stairways to Sin," and "Karla." The government withdrew eight of these titles prior to the

submission of the case to the jury. The three pocketbooks submitted to the jury were "Rambling Maids," "Strange Three," and "Turbulent Daughters." The jury returned a not guilty verdict on "Rambling Maids" and deadlocked on "Strange Three" and "Turbulent Daughters." The entire indictment against plaintiff Aday was subsequently dismissed. With the exception of the proceedings mentioned in Paragraph 3 of this stipulation concerning the book "Black Night," there have been no other federal criminal proceedings against these plaintiffs at any time relating to any of the publications mentioned in this paragraph.

3. Plaintiffs West Coast News Company, Aday and Maxey were indicted for violations of Title 18, United States Code, Section 1462 in Grand Rapids, Michigan, on May 24, 1960; in Phoenix, Arizona, on April 26, 1960; and in Honolulu, Hawaii, on October 12, 1960. The titles involved in each of these cases were as follows:

a. Grand Rapids—"Sex Life of a Cop," "Decisive Years," "The Black Night," "Witch Finder," "Love Princess," "Never Enough," "I am a Lesbian," and "Desperate Moments";

b. Phoenix—"Sex Life of a Cop";

c. Honolulu—"Sex Life of a Cop," "Decisive Years," and "Each Won Two."

4. The case against plaintiffs in Grand Rapids, Michigan, proceeded to trial on October 28, 1963, but the proceedings in Honolulu and Phoenix were dismissed by the government prior to trial and after the conviction in Grand Rapids.

5. The plaintiffs, Maxey, Aday, and West Coast News Company, were convicted in Grand Rapids, Mich-

igan, on December 12, 1963, and were sentenced on December 30, 1963. Their convictions were on five of the eighteen counts charged in the indictment. The indictment charged that eight books in the shipments were obscene, but the jury disagreed among themselves as to all but "Sex Life of a Cop." Plaintiff West Coast News Company was fined a total of $25,000; Plaintiff Aday was fined a total of $25,000 and sentenced to a total prison term of 25 years, subject to the terms of Title 18, United States Code, Section 4208(a)(2); and plaintiff Maxey was fined a total of $19,000 and sentenced to a total prison term of fifteen years, also subject to Title 18, United States Code, Section 4208(a)(2). One of the defenses raised in that proceeding and overruled by the district court was the unconstitutionality of the venue provisions of the 1958 amendments to the federal obscenity statutes.

6. On March 22, 1966, the Grand Rapids conviction was sustained by the Sixth Circuit Court of Appeals but the case was remanded for reconsideration of the sentence. *United States v. West Coast News Company,* 357 F. 2d 855. In its opinion, the Circuit Court rejected plaintiffs' challenge to the constitutionality of the venue provisions embodied in the 1958 amendments to the federal obscenity statutes. On April 6, 1966, the District Court resentenced Aday to ten years imprisonment and Maxey to five years imprisonment, again subject to the terms of Title 18, United States Code, Section 4208(a)(2). The court left in effect the fines which it had initially imposed. The plaintiffs, on May 18, 1966, filed a petition for a writ of certiorari to the United States Supreme Court which is still pending.

7. On March 26, 1965, plaintiffs Aday, Maxey, and West Coast News Company were indicted on ten counts in Houston, Texas, for allegedly shipping quantities of five different paperback books from other states into the Southern District of Texas in violation of the federal obscenity statutes. The five titles involved were: "The Awakening of Cindy," "The Girls of Club Sappho," "The Women were Willing," "The Swingers," and "Twisted Passions." The transportations charged occurred between November 14, 1962 and March 2, 1965. All ten of these alleged transportations occurred after the return, on May 24, 1960, of the indictment in Grand Rapids, Michigan, and six of the transportations occurred after December 12, 1963, the date of the Grand Rapids conviction.

8. There have been no other federal criminal proceedings against these plaintiffs at any time relating to any of the publications mentioned in Paragraphs 2, 3, and 7 of this stipulation or relating to any other of their publications.

9. The books named in the Honolulu, Grand Rapids and Houston indictments were transported into the districts wherein the indictments were returned in the regular course of plaintiffs' business. In each case the books were then purchased from local retail outlets by agents of the Federal Bureau of Investigation.

II.

Civil Action No. 1744-65

10. The plaintiffs, Reed Enterprises and Corinth Publications are California corporations with their principal place of business in San Diego, California. The other plaintiffs in Civil Action No. 1744-65 reside

and work in or around the following locations: Richard A. Yerxa in San Diego, California; William L. Hamling in Palm Springs, California.

11. On September 10, 1965, in Houston, Texas, the plaintiffs in Civil Action No. 1744-65 were indicted on twenty-six counts for allegedly shipping quantities of seven different paperback books from other states into the Southern District of Texas in violation of the federal obscenity statutes. In addition to these plaintiffs, six others were also named in the same indictment: Stephen A. Keegan of San Diego, California; Donald M. Partrick of El Cajon, California; Shirley R. Wright of La Mesa, California; and Walter H. Lonsdale of Gardena, California; Howard E. Stephens and Stephens Printing Corporation of Sandusky, Ohio. The titles of the books named in the Houston indictment were: "Orgy Club," "Sin Summer," "Shame Hunger," "Temple of Shame," "Virgins, Inc.," "Passion Carousel," and "Swap Sect." Six of the books were alleged in the indictment to have been transported from Sandusky, Ohio, to the Southern District of Texas. The seventh book was alleged to have been transported from Los Angeles, California, to the Southern District of Texas.

12. The seven books named in the Houston indictment were transported into the Southern District of Texas in the regular course of plaintiffs' business operations and were then purchased from local retail outlets by agents of the Federal Bureau of Investigation.

13. On September 2, 1966, following a trial of eight weeks, the jury reported itself deadlocked and was dismissed. All of the individual defendants and their five attorneys were present in the courtroom in

Houston, Texas, throughout the trial. On February 17, 1967, United States District Judge Joe Ingraham denied defendants' motions for judgments of acquittal. The case has been scheduled for retrial commencing on May 15, 1967.

14. There have been no other federal criminal proceedings against these plaintiffs relating to any of the publications mentioned in Paragraph 11 of this stipulation or relating to any other of their publications.

III.

Civil Action No. 2562-65

15. The plaintiffs, Sun Era, Inc., American Art Agency, Inc., Parliament News, Inc., and London Press, Inc., are all California corporations with their principal office in North Hollywood, California. The plaintiffs, Milton Luros, Beatrice B. Luros, Stanley E. Sohler, Melvin Friedman, Elmer A. Batters, Bernard J. Abramson, Harold Straubing, Paul Wisner, Sam Merwin, Jr., and Victor J. Banis, all reside and work in on around Los Angeles, California. The plaintiff Richard E. Geis resides in or around Portland, Oregon.

16. On March 24, 1965, in Fort Dodge, Iowa, these plaintiffs were indicted on twenty-five counts for allegedly shipping interstate and mailing quantities of six different paperback books and twenty-five different magazines into the Northern District of Iowa in violation of the federal obscenity statutes. *United States v. Luros*, No. 65-Cr-3007-W, N.D. Iowa. In addition to the plaintiffs in Civil Action No. 2562-65, Wayne Cantrell Vance was also named as a defendant in the Iowa indictment. The titles of the paperback books involved in the indictment were: "The Affairs of Gloria,"

"Lesbian Alley," "Pleasure House," "Two Women in Love," "The Three Way Apartment," and "Lesbian Sin Song." The titles and issues of the magazines involved in the indictment were: "Teenage Nudist," Vol. 1, No. 1, "Nudist Photo Field Trip," No. 6, "Urban Nudist," Vol. 1, Nos. 8, 9, 10, and 11, "Sun Era," Vol. 1, Nos. 8 and 10 and Vol. 2, Nos. 2 and 4, "Nudist Colorama," Nos. 2 and 3, "Popular Nudism," Vol. 1, Nos. 3 and 4, "Nudist Week," "Cocktail," Vol. 4, No. 3, "Affair," Vol. 1, No. 3, "Trojan," Vol. 3, No. 1, "Late Date," Vol. 2, No. 2, "Showoff," No. 2, "Matinee," Vol. 2, No. 1, "Sensation," Vol. 1, No. 3, "Body Shop," Vol. 1, No. 4, "Late Show", Vol. 2, No. 1, "Snap," Vol. 4, No. 2, and "Tip Top," Vol. 3, No. 6.

17. The indictment alleged the shipment into the Northern District of Iowa by common carrier of 50 copies of "Nudist Colorama," No. 3, 50 copies of "Nudist Week," 15 copies of "Cocktail," Vol. 4, No. 3, 15 copies of "Affair," Vol. 1, No. 3, 15 copies of "Trojan," Vol. 3, No. 1, 15 copies of "Late Date," Vol. 2, No. 2, 10 copies of "Showoff," No. 2, and 15 copies of "Matinee," Vol. 2, No. 1. The remaining titles named in the indictment were alleged to have been mailed into the Northern District of Iowa. The evidence at trial showed that these mailings were made in response to test orders placed by postmasters in the Northern District of Iowa in accordance with instructions given by two postal inspectors. In response to the test orders, one copy of "Teenage Nudist," Vol. 1, No. 1, one copy of "Nudist Photo Field Trip," No. 6, one copy of "Urban Nudist," Vol. 1, No. 9, one copy of "Sun Era," Vol. 1, No. 8, one copy of "Urban Nudist," Vol. 1, No. 10, one copy of "Nudist Colorama Number

2," one copy of "Sun Era," Vol. 1, No. 10, one copy of "Urban Nudist," Vol. 1, No. 11, one copy of "Sun Era," Vol. 2, No. 2 (Number 14), one copy of "Popular Nudism," Vol. 1, No. 3, one copy of "Popular Nudism," Vol. 1, No. 4, one copy of "Sensation," Vol. 1, No. 3, one copy of "Body Shop," Vol. 1, No, 4, one copy of "Late Show," Vol. 2, No. 1, one copy of "Snap," Vol. 4, No. 2, one copy of "Tip Top," Vol. 3, No. 6, and one copy of "Lesbian Sin Song" were received by postmasters in the Northern District of Iowa. Following their receipt, these materials were sent to a postal inspector in Los Angeles, California. In response to other test orders, one copy of "Sun Era," Vol. 2, No. 4 (Number 16), one copy of "Lesbian Alley," one copy of "The Three Way Apartment" and one copy of "The Affairs of Gloria" were received by postmasters in the Northern District of Iowa. Following their receipt these materials were sent to a postal inspector in Fort Dodge, Iowa. In response to another test order, one copy of "Pleasure House," was received by a postmaster in the Northern District of Iowa. Following its receipt, this material was sent to a postal inspector in St. Louis, Missouri. In response to still another test order, one copy of "Two Women in Love" was received directly by a postal inspector at Sioux City, Iowa.

18. During the course of the trial in *United States v. Luros,* subpoenaed invoices of Parliament News, Inc. were introduced into evidence. These invoices showed that during the period covered by the indictment, December 30, 1963, through March 24, 1965, Parliament News, Inc. shipped the following quantities of materials named in the indictment into Sioux City in the

Northern District of Iowa in the ordinary course of its business.

Titles	Number of Copies
Teenage Nudist, Vol. 1, No. 1	50
Urban Nudist, Vol. 1, No. 8	50
Urban Nudist, Vol. 1, No. 9	50
Urban Nudist, Vol. 1, No. 10	50
Urban Nudist, Vol. 1, No. 11	75
Nudist Colorama, No. 2	75
Nudist Colorama, No. 3	50
Nudist Photo Field Trip, No. 6	75
Sun Era, Vol. 1, No. 8	50
Sun Era, Vol. 1, No. 10	75
Sun Era, Vol. 2, No. 2 (No. 14)	50
Sun Era, Vol. 2, No. 4 (No. 16)	50
Popular Nudism, Vol. 1, No. 3	50
Popular Nudism, Vol. 1, No. 4	50
Nudist Week	50
Snap, Vol. 4, No. 2	15
Late Show, Vol. 2, No. 1	25
Body Shop, Vol. 1, No. 4	25
Affair, Vol. 1, No. 3	15
Trojan, Vol. 3, No. 1	15
Late Date, Vol. 2, No. 2	15
Showoff, No. 2	10
Matinee, Vol. 2, No. 1	15
Sensation, Vol. 1, No. 3	15

The foregoing figures do not reflect distributions made into the Northern District of Iowa by Sun Era, Inc. and American Art Agency, Inc.

19. The following quantities of materials named in the *Luros* indictment were mailed into the Northern District of Iowa by Parliament News, Inc., Sun Era,

Inc. or American Art Agency, Inc. in response to test orders or subscriptions sent by postmasters in Iowa.

Titles	Number of Copies
Teenage Nudist, Vol. 1, No. 1	1
Nudist Photo Field Trip, No. 6	1
Urban Nudist, Vol. 1, No. 8	1
Urban Nudist, Vol. 1, No. 9	1
Urban Nudist, Vol. 1, No. 10	1
Urban Nudist, Vol. 1, No. 11	1
San Era, Vol. 1, No. 8	1
Sun Era, Vol. 1, No. 10	1
Sun Era, Vol. 2, No. 2 (No. 14)	1
Sun Era, Vol. 2, No. 4 (No. 16)	1
Nudist Colorama, No. 2	1
Popular Nudism, Vol. 1, No. 3	1
Popular Nudism, Vol. 1, No. 4	1
Sensation, Vol. 1, No. 3	1
Body Shop, Vol. 1, No. 4	1
Late Show, Vol. 2, No. 1	1
Snap, Vol. 4, No. 2	1
Tip Top, Vol. 3, No. 6	1
Lesbian Sin Song	2
Two Women in Love	3
Pleasure House	2
Lesbian Alley	2
The Three Way Apartment	2
The Affairs of Gloria	2

20. Trial began in the Northern District of Iowa on October 18, 1965. Prior to the submission of the case to the jury, Judge William Hanson dismissed the conspiracy count and counts 9, 15, 16, 17, 18, and 19, thereby withdrawing from the jury's consideration the following titles: "Cocktail," Vol. 4, No. 3, "Affair,"

Vol. 1, No. 3, "Trojan," Vol. 3, No. 1, "Late Date," Vol. 2, No. 2, "Showoff," No. 2, "Matinee," Vol. 2, No. 1, "Sensation," Vol. 1, No. 3 "Body Shop," Vol. 1, No. 4, "Late Show," Vol. 2, No. 1, "Snap," Vol. 4, No. 2, "Tip Top," Vol. 3, No. 6 and "Sun Era," Vol. 2, No. 4 (No. 16). In all, eighteen of the original twenty-five counts were submitted to the jury and on January 14, 1966, the jury found all parties guilty on each of these eighteen counts. All six paperback books were determined by the jury to be obscene. The magazines determined by the jury to be obscene were: "Teenage Nudist," Vol, 1, No. 1, "Nudist Photo Field Trip," No. 6, "Urban Nudist," Vol. 1, Nos. 8, 9, 10, and 11, "Sun Era," Vol. 1, Nos. 8 and 10, Vol. 2, No. 2 (No. 14), "Nudist Colorama," Nos. 2 and 3, "Popular Nudism," Vol. 1, Nos. 3 and 4, and "Nudist Week." Motions for judgment of acquittal were later granted as to all the individual defendants except Milton Luros on the ground that the government had failed to offer adequate proof satisfying the element of scienter. Motions for judgment of acquittal were denied as to Milton Luros and the corporate defendants. See, 260 F. Supp. 697. On January 6, 1967, Milton Luros was sentenced to five years in the federal penitentiary and fined $25,000. Parliament News, Inc. and London Press, Inc. were each fined $25,000 and Sun Era, Inc., and American Art Agency, Inc. each received fines of $12,000. Notice of appeal has been filed.

21. There have been no other federal criminal proceedings against these plaintiffs at any time relating to the publications mentioned in Paragraph 16 of this stipulation or relating to any other of their publications.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1092

REED ENTERPRISES, ET AL., APPELLANTS

v.

RAMSEY CLARK, ET AL.

MILTON LUROS, ET AL., APPELLANTS

v.

RAMSEY CLARK, ET AL.

SANFORD ELESTEL ADAY, APPELLANTS

v.

RAMSEY CLARK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from an order of a three-judge district court, entered on October 26, 1967, granting the motion of appellees (the Attorney General and several of his assistants who aid in the enforcement of the federal obscenity laws) for summary judgment in each of these consolidated actions. Appellants are publishers and distributors of books and magazines which have been characterized by their attorney in these proceedings as "borderline or marginal" with respect to those laws (J.S. App. A, 3). Pursuant to 28 U.S.C. 2282, they had sought to enjoin the enforcement of 18 U.S.C. 1461 (proscribing the use of the mails to transport obscene matter) and 18 U.S.C. 1462 (forbidding the use of common carriers for the interstate carriage of such matter) to the extent that—read in conjunction with the general federal venue provision applicable to offenses involving use of the mails and interstate facilities (18 U.S.C. 3237(a))—the statutes permit prosecutions to be brought in districts other than those in which the allegedly offensive materials are placed in the mail or deposited with the carrier.[1] It was contended that, insofar as the statutes authorize this, they are unconstitutional.

1. Prior to 1958, 18 U.S.C. 1461 provided for the punishment of anyone who knowingly "deposits for mailing or delivery" any material declared by the section to be nonmailable (such material including

[1] The pertinent statutory provisions appear in the Appendix, *infra*, pp. 15–16.

anything that was obscene) (18 U.S.C. (1952 ed.) 1461). 18 U.S.C. 1462 provided for the punishment of anyone who knowingly "deposits with any express company or other common carrier, for carriage in interstate or foreign commerce", any obscene matter (18 U.S.C. (1952 ed.) 1462). Then, as now, a general venue statute applicable to offenses involving use of the mails or the facilities of commerce (18 U.S.C. (1952 ed.) 3237, now 18 U.S.C. 3237(a)) provided:

> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

In 1953, notwithstanding this explicit venue provision, the Court of Appeals for the Tenth Circuit, in *United States* v. *Ross*, 205 F. 2d 619, held that a prosecution under 18 U.S.C. 1461 for depositing nonmailable matter in the mail in one district for delivery in another district could be brought only in the district of mailing. Distinguishing between a "deposit for mailing" (the term used in Section 1461) and "use of the mails" (the phrase used in the venue statute), the court held that the offense charged was complete when the offensive matter was placed in the mail; that no "use of the mails" (and hence no "continuing act") was involved; and that as a consequence the venue statute was inapplicable (205 F. 2d at 620-621). The court, accordingly, sustained the dismissal of an indictment which had been returned in the District of Kansas

for the offense of depositing nonmailable matter in the mail in California for delivery in Kansas.

To overcome the effect of the *Ross* decision, Congress, in 1958, amended 18 U.S.C. 1461 by substituting the words "uses the mails for the mailing, carriage in the mails, or delivery of * * *" in place of "deposits for mailing or delivery * * *". At the same time it amended 18 U.S.C. 1462 by substituting "uses * * *" for "deposits with * * *". Act of August 28, 1958 (Public Law 85–796), §§ 1 and 2(a), 72 Stat. 962 (Appendix, *infra*, p. 15). The legislative history of the 1958 Act shows (and appellants do not dispute) that Congress's purpose in effecting these changes was to make the above-quoted general venue provision applicable to offenses charged under those sections.[2]

2. In 1965, each of the three groups of appellants involved in these cases filed in the United States District Court for the District of Columbia a separate complaint for injunctive and declaratory relief alleging that 18 U.S.C. 1461 and 1462, as thus amended in 1958, violated their constitutional rights in that, *inter alia*, the statutes abridged their First Amendment rights of freedom of speech and of the press and, by purportedly authorizing arbitrary forum-picking by federal prosecutors and the institution of multiple prosecutions relating to identical materials in districts

[2] H. Rep. No. 1614, 85th Cong., 2d Sess.; S. Rep. No. 1839, 85th Cong., 2d Sess.; H. Rep. No. 2624, 85th Cong., 2d Sess. (conference report); 104 Cong. Rec. 8991–8992, 8994. The pertinent legislative history is reviewed by the court below at J.S. App. A, 12–14. See also *United States* v. *West Coast News Co.*, 30 F.R.D. 13, 18–19 (W.D. Mich.), affirmed, 357 F. 2d 855 (C.A. 6), reversed on other grounds *sub nom. Aday* v. *United States*, 388 U.S. 447.

far removed from the residences and places of business of alleged violators, were repugnant to the due process and fair trial provisions of the Fifth and Sixth Amendments. It was alleged that it was the intention of appellees to initiate criminal prosecutions under the statutes throughout the United States and in locations far from appellants' principal places of business; that such prosecutions would involve them in a multiplicity of legal proceedings, destroy their good will and property, and exhaust their physical and financial resources; and that as a consequence they would suffer irreparable damage for which they had no adequate remedy at law. Each appellant prayed for a declaration that the statutes as amended violate the First, Fifth, and Sixth Amendments; for an injunction restraining appellees from enforcing them; and for the convocation of a three-judge court pursuant to 28 U.S.C. 2282 and 2284 (J.S. 4–6; J.S. App. B, 25–26).

In the first two of these cases (*Reed Enterprises, et al.* and *Milton Luros, et al.*), the applications for the convening of a three-judge court were initially denied by single district judges (J.S. App. A, 1). On December 2, 1965, the Court of Appeals for the District of Columbia Circuit, in consolidated mandamus proceedings brought by the plaintiffs in those cases, ordered that a three-judge court be convened to consider the issues raised. *Reed Enterprises* v. *Corcoran*, 354 F. 2d 519 (J.S. App. B). The third of the three present cases (*Sanford Elestel Aday, et al.*), in which identical issues were presented, was initially filed in the district court on the day on which the court of

appeals' mandamus judgment was entered. A three-judge court was thereafter convened and all three cases were consolidated for decision (J.S. App. A, 1). At the hearing on cross-motions for summary judgment, appellants narrowed their constitutional attack to the claim that 18 U.S.C. 1461 and 1462, as amended in 1958, "are unconstitutional on their face" (J.S. App. A, 4–5).[3] Holding the claim to be without merit (J.S. App. A, 21), the court granted appellees' motion for summary judgment (J.S. App. A).

ARGUMENT

The instant appeal presents no question warranting plenary consideration by this Court. The issue is a simple one—whether Congress can constitutionally make the offense of using the mails or the facilities of interstate commerce to transport obscene materials subject to prosecution, like any other offense involving the use of these instruments, "in any district from, through, or into which such commerce or mail matter moves" (18 U.S.C. 3237(a)). The district court correctly held that neither the First Amendment nor any other provision of the Constitution prevented Congress from making this general venue statute applicable to obscenity offenses in precisely the same man-

[3] The court observed that appellants had been constrained thus to narrow the issue for the reason that, as reflected by the stipulated facts giving the details of past and pending prosecutions involving them (see J.S. App. D), appellants were able to "allege only a *potential* threat of prosecution in multiple districts and a *potential* objective of depriving them of their constitutional rights * * *" (J.S. App. A, 5; emphasis by the court).

ner in which it applies to other ~~commerce-related~~ crimes involving commerce or use of the mails.[4]

1. It is clear that for any ordinary offense which because of its "continuing" nature is capable of being committed in more than one district—including, typically, all ordinary offenses involving the use of the mails or of the instrumentalities of commerce—Congress has the power to prescribe (or to authorize the enforcement authorities to select) the district in which the offense shall be prosecuted. *Travis* v. *United States,* 364 U.S. 631, 634–635; *United States* v. *Johnson,* 323 U.S. 273, 274–275; *Salinger* v. *Loisel,* 265 U.S. 224, 232–235; *Armour Packing Co.* v. *United States,* 209 U.S. 56, 72–77; *United States* v. *Sorce,* 308 F. 2d 299, 300–301 (C.A. 4) cf. *Hagner* v. *United States,* 285 U.S. 427. Thus, in *United States* v. *Johnson, supra,* involving the question whether violations of the Federal Denture Act (using the mails or the facilities of commerce to send into any State a denture not cast by a person licensed to practice dentistry therein) could be prosecuted in the district *to* which, or only in the district *from* which, the ob-

[4] Every other court that has had occasion to consider the question has agreed. *United States* v. *West Coast News Co.,* 30 F.R.D. 13, 20–24 (W.D. Mich.), affirmed, 357 F. 2d 855, 861 (C.A. 6), reversed on other grounds *sub nom. Aday* v. *United States,* 388 U.S. 447; *United States* v. *Lyros,* 243 F. Supp. 160, 167–168 (N.D. Iowa), reversed on other grounds, C.A. 8, Nos. 18,707–18,711, decided February 7, 1968; *United States* v. *Frew,* 187 F. Supp. 500, 507 (E.D. Mich.); *Toscano* v. *Olesen,* 184 F. Supp. 296, 297 (S.D. Calif.). And see Mr. Justice Black's *obiter* observation in *Ginzburg* v. *United States,* 383 U.S. 463, 480 (dissenting): "[O]ne must remember that the Federal Government has the power to try a man for mailing obscene matter in a court 3,000 miles from his home."

jectionable denture had been mailed,[5] the Court observed (323 U.S. at 274):

> Must these appellees be tried in the Northern district of Illinois [the place of mailing] or may they be tried in the district of any State through which the dentures were carried including Delaware, the place of delivery? Has Congress authorized such discretion in the enforcement of this Act? If it has, there is an end to the matter, for Congress may constitutionally make the practices which led to the Federal Denture Act triable in any federal district through which an offending denture is transported. * * *

"By utilizing the doctrine of a continuing offense," the Court further noted (*id.* at 275),

> Congress may * * * provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates. Thus, an illegal use of the mails or of other instruments of commerce may subject the user to prosecution in the district where he sent the goods, or in the district of their arrival, or in any intervening district. * * *

Accordingly, in light of this line of authority, the only question posed by this case is whether the fact that the obscenity statutes touch on the area of protected expression under the First Amendment requires a different result. In substance, the issue is whether this factor precludes Congress from doing in this area what it plainly is free to do with respect to all other criminal statutes regulating use of the mails

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[5] The *Johnson* case arose before the enactment of the provision of 18 U.S.C. 3237(a) which is involved here. The decision, in fact, was the occasion for the provision's enactment (see Reviser's Note).

and the channels of commerce—fix the venue for prosecutions thereunder in any district in which the continuing offense was committed.

The substance of appellants' argument is that the existence and potential use of the government's authority to select venue in obscenity prosecutions has an *in terrorem* effect which may intimidate publishers and sellers of books from exercising to the full their First Amendment rights. It is difficult at best, they say, to defend in the field of obscenity, where the standards and concepts are necessarily vague, but when additionally a potential violator is required to meet the economic burden of defense away from home and the uncertainty that is implicit when juries in different and possibly widely separated jurisdictions are required to decide what is obscene, the combination of factors fosters undue self-censorship and makes inaccessible to the public constitutionally protected expression (J.S. 19–27; see J.S. App. A, 16).

However, as the court below pointed out, the primary basis for the self-censorship which publishers and book dealers exercise lies in the obscenity statutes themselves, the validity of which was sustained in *Roth* v. *United States*, 354 U.S. 476, as against challenges based in large part on First Amendment grounds (J.S. App. A, 18–19). It is evident that the very existence of laws against obscenity induces some degree of self-censorship; this indeed is their purpose. Thus, the question is not whether the venue amendments induce self-censorship but whether they "increased the existing pressures toward self-censorship

to a constitutionally unacceptable degree" (J.S. App. A, 20–21). We submit that, as the court below held, they clearly did not. At least in a constitutional sense, any increase in self-censorship attributable to the 1958 venue amendments was "at most ancillary and *de minimis*" (J.S. App. A, 21), for "if a publisher is going to feel restrained, it will be out of fear of *any* prosecution rather than fear of prosecution in other than his home district" (*ibid.;* emphasis by the court).

2. Appellants argue that it is unreasonable to impose on publishers and distributors of books dealing with sex the risk of deciding on which side of the line separating the obscene from the acceptable a jury in a locality far removed from their homes will place a particular publication (J.S. 25–27). This risk is one, however, that inheres in the jury system itself. Cf. *Roth* v. *United States,* 354 U. 476, 492, n. 30. It is not fundamentally different from the risk a potential violator must assume even if he could be sure he would be tried in his vicinage. Wherever the trial is held, the standard to be applied by the jury as to what constitutes obscenity in a particular case is, as the court below pointed out, "a *uniform* and constitutionally sufficient" one (J.S. App. A, 19; emphasis by the court). The jury's findings (if the case reaches that stage) are of course subject to the trial judge's limiting instructions, patterned on this Court's relevant decisions. If conviction results, the findings are subject to further scrutiny by the appellate courts, including, if appropriate, review by this Court. This Court's ob-

scenity decisions give scant support to the expressed fears of appellants that good-faith disseminators of materials dealing with sex face financial ruin at the hands of juries the country over if the venue amendments they challenge are upheld. See, *e.g.*, *Manual Enterprises* v. *Day*, 370 U.S. 478, 488; *Jacobellis* v. *Ohio*, 378 U.S. 184, 192–195; *Redrup* v. *New York*, 386 U.S. 767, 770–771. In *Redrup* the Court indicated that the three-element standard of obscenity developed in earlier decisions (dominant appeal to prurient interest, patent offensiveness, and utter lack of redeeming social value) is a constitutional one which all juries throughout the United States must apply to the evidence when passing on the issue of obscenity. Under these decisions it is evident that the area of possible disagreement among juries in different parts of the country as to what is obscene has been significantly narrowed.

3. It is evident that such harm as is caused by obscene publications is sustained in the communities where they are disseminated, not primarily where they are deposited for mailing or delivered to the carrier for shipment. It would be anomalous, therefore, if the disseminators of such materials could be constitutionally proceeded against *only* in the district where they performed the relatively innocuous act of placing the materials in the mails or starting them on their interstate journey. Cf. *In re Palliser*, 136 U.S. 257, 266–268. Since it is the residents of the districts where distribution occurs who are primarily affected by the offensive matter, a jury drawn from one of those districts would manifestly constitute a more appropriate tribunal than one drawn from the district

where the materials first chanced to enter the channels of commerce, and whose residents might have little interest in prosecuting the offender.

4. As a consequence of the 1958 amendments to the obscenity laws, use of the mails or of interstate facilities to carry obscene material is theoretically subject to prosecution in any district *through* which as well as any district *from* or *into* which the commerce or mailed matter moves. This is true, not in consequence of any provision peculiar to the obscenity laws, but because the general venue statute applicable to mail and commerce offenses—which the 1958 amendments made applicable to obscenity violations—so provides. At least so far as any prosecution under the obscenity laws is concerned, however, no use has ever been made of the *in transitu* venue provision, and none is contemplated by the government. While we do not question its validity (see *Armour Packing Co.* v. *United States,* 209 U.S. 56, 72–77;[6] *United States* v. *Johnson,* 323 U.S., 273, 274–275), it is appropriate to suggest, in view of the unlikelihood of its ever being used in the obscenity context, that it will be time enough to consider its constitutionality when and if an attempt is ever made to utilize it. See *United States* v. *Frew,*

[6] In the *Armour Packing Co.* case, as the court below noted (J.S. App. A, 8–9), this Court affirmed a conviction under the Elkins Act, prohibiting interstate transportation of goods at rates less than those prescribed by regulated tariffs, in a prosecution brought under an *in transitu* provision comparable to the one involved here. The Court observed that "when it [the offense] takes place, whether in one district or another, whether at the beginning, at the end, or in the middle of the journey, *it is equally and at all times committed*" (209 U.S. at 74; emphasis added).

187 F. Supp. 500, 507 (E.D. Mich.). Cf. *Jeffrey Mfg. Co.* v. *Blagg*, 235 U.S. 571, 576; *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U.S. 217, 219–220; *United States* v. *Wurzbach*, 280 U.S. 396, 399; *Blackmer* v. *United States*, 284 U.S. 421, 442; *Virginian Ry.* v. *Federation*, 300 U.S. 515, 558.

5. Except in extraordinary circumstances and to prevent immediate and irreparable loss, equity courts will not interfere to prevent the enforcement of a criminal statute even though the statute is unconstitutional. As observed by this Court in *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 95:

> The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. * * * To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. * * * We have said that it must appear that "the danger of irreparable loss is both great and immediate" * * *.

See also *Beal* v. *Missouri Pacific R. Co.*, 312 U.S. 45, 49; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 451–452; *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 500; *Packard* v. *Banton*, 264 U.S. 140, 143. Cf. *Dombrowski* v. *Pfister*, 380 U.S. 479, 486. Appellants have made no showing—quite apart from the insubstantiality of their constitutional challenges on the merits—warranting equitable interference with the normal administration of these statutes. As the district court pointed out, appellants were perforce constrained in that court to narrow their attack to a charge that the statutes

were unconstitutional on their face—because they could allege only a *potential* threat of prosecution in multiple districts and a *potential* objective of depriving them of their constitutional rights (J.S. App. A, 4–5). Nothing in the stipulated facts (J.S. App. D) gives support to a claim that appellants have been victims of harassment or that they have cause for future concern in that regard. Should the future enforcement of these statutes give appellants a basis for reasonable complaint, adequate tools exist for dealing with such a situation when it arises.[1]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be summarily affirmed.

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MARCH 1968.

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[1] See, *e.g.*, Rule 21(b), F.R. Crim. P., which provides: "For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district."

APPENDIX

The Act of August 28, 1958 (Public Law 85–796), 72 Stat. 962, provided in pertinent part:

> [Sec. 1.] [T]he eighth paragraph of section 1461 of title 18 of the United States Code is amended to read as follows: "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable * * * shall be fined * * * or imprisoned * * * or both * * *"[1]
>
> Sec. 2. (a) The first paragraph of section 1462 of title 18 of the United States Code is amended to read as follows:
>
> "Whoever * * * knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—".[2]

* * * * *

As thus amended, 18 U.S.C. 1461 and 1462 provide in pertinent part:

> § 1461. *Mailing obscene or crime-inciting matter.*
>
> Every obscene * * * article, matter, thing, device, or substance * * *
>
> * * * * *
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

[1] The paragraph had previously read: "Whoever knowingly deposits for mailing or delivery * * *" (18 U.S.C. (1952 ed.) 1461).

[2] The paragraph had previously read: "Whoever * * * knowingly deposits with any express company or other common carrier * * *" (18 U.S.C. (1952 ed.) 1462).

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable * * * shall be fined * * * or imprisoned * * * or both * * *.

* * * * *

§ 1462. *Importation or transportation of obscene matters.*

Whoever * * * knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(*a*) any obscene * * * matter * * *

* * * * *

Shall be fined * * * or imprisoned * * * or both * * *.

18 U.S.C. 3327(a) provides:

§ 3237. *Offenses begun in one district and completed in another.*

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

U.S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

REED ENTERPRISES ET AL. *v.* CLARK ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 1092. Decided March 25, 1968.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and the case set for oral argument.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.